Supreme Court, U.S.
FILED

001747 MAY 18 2001

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No. 00-___

In The

Supreme Court of the United States

WEST INDIES TRANSPORT CO., INC.,
WIT EQUIPMENT CO., INC., and
W. JAMES OELSNER,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. In proceedings for execution of a criminal restitution judgment, does the "clear error and manifest injustice" exception to the law of the case doctrine permit a court to reconsider the legality of the restitution order itself?

2. In an environmental criminal case brought under various provisions of title 33, U.S. Code:

- Does the pleading and proof of an aiding and abetting theory under 18 U.S.C. § 2 make the case one involving "an offense under this title [*i.e.*, title 18, U.S. Code]," within the meaning of 18 U.S.C. § 3663(a), the restitution provision of the Sentencing Reform Act?

- Is the federal agency with responsibility to attempt remediation of the public harm resulting from the violations, to the extent that the perpetrators do not, a "victim" of the offense within the meaning of 18 U.S.C. § 3663(a), the restitution statute?

LIST OF ALL PARTIES

The caption of the case in this Court contains the names of all parties (West Indies Transport Co., Inc., WIT Equipment Co., Inc., W. James Oelsner and the United States). Witwater Corporation intervened in the action below and was subject to the final order of the district court, but its appeal was not consolidated with the petitioners' and remains pending in the court of appeals.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

WEST INDIES TRANSPORT CO., INC., WIT EQUIPMENT CO., INC., and W. JAMES OELSNER jointly petition this Court for a writ of certiorari to review the judgment and memorandum opinion of the United States Court of Appeals for the Third Circuit filed and entered on December 19, 2000.

OPINIONS BELOW

The Third Circuit's Memorandum Opinion (per Greenberg, J., with Mansmann & Alito, JJ.) was filed December 19, 2000. It is not yet noted in a table of the Federal Reporter. A copy is App. 1. The district court's Memorandum and Order dated July 19, 1999 (filed July 22, and entered July 23, 1999) denying the petitioners' motions, is App. 3. It is published as *United States v. West Indies Transport Co.*, 57 F.Supp.2d 198 (D.V.I. 1999) (Brotman, J.). This district court's opinion and order denying reconsideration is dated March 24, 2000; it was filed March 29 and entered on the docket April 3, 2000. It is not published; a copy is App. 16. An earlier opinion of the district court deciding preliminary questions in this matter is published at 35 F.Supp.2d 450 (D.V.I., filed Dec. 16, 1998). A copy is App. 38. The Third Circuit's published opinion on direct appeal is *United States v. West Indies Transport, Inc.*, 127 F.3d 299 (3d Cir. 1997). A copy is App. 56.

JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit affirming the denial of petitioners' motions to quash a writ of execution against a certain vessel, in order to satisfy a joint and several order of restitution in a criminal case, was filed and entered on December 19, 2000. App. 1. On March 12, 2001, under No. 00A784, Justice Souter extended the time for filing this petition on joint application of the three petitioners to and including May 18, 2001. This petition is timely filed on or before that date. Rules 13.1, 13.3, 30.1; 28 U.S.C. § 2101(c). Petitioners invoke this Court's jurisdiction under 28 U.S.C. § 1254(1).

FEDERAL STATUTES INVOLVED

The aiding and abetting provision of the federal criminal code, 18 U.S.C., provides:

> **§ 2. Principals**
>
> **(a)** Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.
>
> **(b)** Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

The Sentencing Reform Act of 1984, incorporating in this respect the Victim Witness Protection Act of 1982, also part of title 18, U.S. Code, provided in part, at the time of the offenses involved, to wit, at the end of 1993:

§ 3663. Order of restitution

(a)(1) The court, when sentencing a defendant convicted of an offense under this title, or under subsection (h), (i), (j), or (n) of section 902 of the Federal Aviation Act of 1958 (49 U.S.C. 1472), may order, in addition to or, in the case of a misdemeanor, in lieu of any other penalty authorized by law, that the defendant make restitution to any victim of such offense.

* * * *

§ 3664. Procedure for issuance and enforcement of order of restitution

* * * *

(h) An order of restitution may be enforced –

(1) by the United States –

(A) in the manner provided for the collection and payment of fines in subchapter B of chapter 229 of this title; or

(B) in the same manner as a judgment in a civil action; and

(2) by a victim named in the order to receive the restitution, in the same manner as a judgment in a civil action.

* * * *

Subchapter B of chapter 229 of title 18, U.S. Code, provided, in pertinent part:

§ 3613. Civil remedies for satisfaction of an unpaid fine

(a) Lien. – A fine . . . is a lien in favor of the United States upon all property belonging to the person fined. The lien arises at the time of the entry of the judgment and continues until the liability is satisfied, remitted, or set aside, or until it becomes unenforceable pursuant to the provisions of subsection (b). . . .

* * * *

(c) Application of other lien provisions. – The provisions of sections 6323, 6331, 6332, 6334 through 6336, 6337(a), 6338 through 6343, . . . of the Internal Revenue Code of 1954 (26 U.S.C. . . .) and of section 513 of the Act of October 17, 1940, 54 Stat. 1190, apply to a fine and to the lien imposed by section (a) as if the liability of the person fined were for an internal revenue tax assessment. . . .

* * * *

(e) Alternative enforcement. – Notwithstanding any other provision of this section, a judgment imposing a fine may be enforced by execution against the property of the person fined in like manner as judgments in civil cases, but in no event shall liability for payment of a fine extend beyond the period specified in subsection (b) [*i.e.*, 20 years].

At the time execution proceedings commenced, to wit, in November 1998, the restitution enforcement provisions read, in pertinent part:

§ 3664. Procedure for issuance and enforcement of order of restitution

* * * *

(m)(1)(A)(i) An order of restitution may be enforced by the United States in the manner provided for in subchapter C of chapter 227 and subchapter B of chapter 229 of this title; or

(ii) by all other available and reasonable means.

(B) At the request of a victim named in a restitution order, the clerk of the court shall issue an abstract of judgment certifying that a judgment has been entered in favor of such victim in the amount specified in the restitution order. Upon registering, recording, docketing, or indexing such abstract in accordance with the rules and requirements relating to judgments of the court of the State where the district court is located, the abstract of judgment shall be a lien on the property of the defendant located in such State in the same manner and to the same extent and under the same conditions as a judgment of a court of general jurisdiction in that State.

* * * *

Subchapter C of chapter 227 and subchapter B of chapter 229 of title 18, U.S. Code, provide, in pertinent part:

§ 3574. Implementation of a sentence of fine

The implementation of a sentence to pay a fine is governed by the provisions of subchapter B of chapter 229.

§ 3613. Civil remedies for satisfaction of an unpaid fine

(a) Enforcement. – The United States may enforce a judgment imposing a fine in accordance with the practices and procedures for the enforcement of a civil judgment under Federal law or State law. . . .

* * * *

(c) Lien. – A fine imposed pursuant to the provisions of subchapter C of chapter 27 of this title, or an order of restitution made pursuant to section 2248, 2259, 2264, 2327, 3663, 3663A, or 3664 of this title, is a lien in favor of the United States on all property and rights to property of the person fined as if the liability of the person fined were a liability for a tax assessed under the Internal Revue Code of 1986. The lien arises on the entry of judgment and continues for 20 years or until the liability is satisfied, remitted, set aside, or is terminated under subsection (b).

* * * *

(f) Applicability to order of restitution. – In accordance with section 3664(m)(1)(A) of this title, all provisions of this section are available to the United States for the enforcement of an order of restitution.

STATEMENT OF THE CASE

This petition presents a basic question of legality in the imposition and enforcement of a federal criminal sentence. The Third Circuit affirmed an order of restitution that the governing statute forbids, and then affirmed

a dubious enforcement of that order against property not owned by the defendant-petitioners.

a. Procedural History

The petitioners were convicted after a jury trial in the District Court of the Virgin Islands for federal environmental and immigration offenses, 33 U.S.C. §§ 403, 406 (Rivers and Harbors Act); 1311, 1319(c)(1), and 1319(c)(2)(A) (Clean Water Act); 1411(a)(1) and 1415(b)(1) (Ocean Dumping Act). The indictment also alleged liability under 18 U.S.C. § 2, the aiding and abetting statute. The petitioners were also convicted under 18 U.S.C. § 1546 (visa fraud) and 371 (conspiracy to defraud the United States with respect to employment taxes on foreign workers and to commit visa fraud), and for "Corrupt Organizations" (a local Virgin Islands RICO offense) in violation of 14 V.I.C. § 604.

On January 5, 1996, Judge Brotman sentenced petitioner Oelsner to serve concurrent terms aggregating 37 months' imprisonment, to be followed by three years' supervised release, and to pay special assessments, $95,500 in fines and up to $1,440,450 in restitution (subject to rebate if the cost of pollution abatement proved to be less), although the payee of that restitution was not specified.[1] The corporate petitioners were sentenced to

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[1] Neither the sentencing transcript nor the judgments say expressly to whom the restitution is payable, but the court later clarified that the United States is the recipient intended by the district court. App. 47-48, 55. It is the Coast Guard which undertook the salvage and clean-up operation, or at least the supervision of that operation, which resulted from the

pay fines and restitution. As part of the judgment in the criminal case against each of the three petitioners, the district court declared that 16 enumerated vessels and properties were "associated with the defendant [Oelsner]" and were "subject to lien" for satisfaction of the judgment. Included among these was the vessel "Wittug." Judgment was entered March 26, 1996.

On direct appeal, the Third Circuit affirmed in a published opinion. App. 56. This Court denied certiorari. *United States v. West Indies Transport Co., et al.*, 522 U.S. 1052 (Jan. 12, 1998) (No. 97-931).

On April 16, 1996, the United States recorded a lien against the Wittug at the Recorder of Deeds, Division of St. Croix, to satisfy the $1.44 million judgment previously entered against petitioner Oelsner. On November 9, 1998, the government applied for a writ of execution on the vessel Wittug. The same day, Witwater Corp., which was not a criminal defendant and is not a petitioner herein, filed an emergency motion to intervene, claiming it was the owner of the Wittug. The district court issued the requested writ on November 12. Shortly thereafter, the defendants (petitioners herein) also opposed execution,

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petitioners' alleged environmental violations. (In fact most of the work has been and is being done by the petitioners themselves.) As the district court stated at sentencing, "[T]he Coast Guard, after having given allowance to everything that this defendant has done in terms of clean-up, finds that it would . . . still take $1,440,450 to complete. I will accept that figure." Tr. at 87. No loss to any victim was incurred from the visa fraud offenses, and no restitution was imposed on that account or on account of the conspiracy to defraud, nor was restitution part of the judgment of sentence on the one Virgin Islands Code offense.

filing a motion to quash the writ of execution on various grounds. Witwater also filed a civil action seeking the same relief. The district court granted the motion to intervene and scheduled a hearing. App. 38 (*United States v. West Indies Transport Co.*, 35 F.Supp.2d 450, 455, 458 (D.V.I. 1998)). After hearing, by opinion and order filed July 19, 1999, the district court denied petitioners relief on the merits. App. 3 (*United States v. West Indies Transport Co.*, 57 F.Supp.2d 198 (D.V.I. 1999)). Petitioners timely sought reconsideration, which was also denied. App. 16. On appeal by petitioners, the Third Circuit again affirmed, essentially adopting the decisions of the district court. App. 1.

This petition followed. Witwater Corp.'s separate appeal was not consolidated; it remains pending before the Third Circuit.

b. Statement of Facts

The facts as related at trial are summarized in the light most favorable to the verdicts, in the Third Circuit's decision on direct appeal, App. 56, as follows:

> West Indies Transport, Inc. and WIT Equipment Co. (collectively "West Indies Transport") operated several businesses in Krum Bay, St. Thomas, including a dry dock, ship repair facility, and barge towing company. West Indies Transport's chief operating officer was W. James Oelsner. In 1987, West Indies Transport obtained permits to use five barges as fixed docks for its other vessels. In 1989, Hurricane Hugo seriously damaged some of these barges, shifting them from their permitted positions. West Indies Transport did not attempt to repair, reposition, or salvage these barges after the storm. Instead,

it used these barges as docks, repair facilities, and housing for employees in their new unauthorized locations. In the process, West Indies Transport attached the barges permanently to shore, constructed walkways and ramps between the barges for use by vehicles and employees, and wired them for electricity.

To staff its facilities, West Indies Transport hired an overseas agent to recruit Filipino workers. The Filipino workers were instructed to apply for D-1 visas intended for non-immigrant foreign maritime crewmen, not the H-2 visas [allegedly] required by law. The "West Indies Transport crewmen" never put to sea. Instead, West Indies Transport housed them in a converted shipping container on a barge and used them as dock workers. The Filipino workers were paid approximately $400 per month for a 56-hour work week. By using underpaid[,] illegal[,] foreign employees, West Indies Transport was able to reduce significantly its expenses for wages and wage taxes.

In the course of its repair operations, West Indies Transport [allowed] several different [objects and substances, which the indictment described as] pollutants into the navigable waters of the United States. *Witconcrete II*, a ferro-concrete barge, was heavily damaged in Hurricane Hugo. The stern was partially severed from the remainder of the barge, attached only by metal reinforcing bars, known as rebar. West Indies Transport did not attempt to repair, break up, or salvage the damaged stern. Instead, it cut the rebar by which the stern was attached and dumped the stern into the bay. Later, when West Indies Transport decided to

> move the barge, it cut additional protruding pieces of rebar from the structure and dumped them in the water. West Indies Transport also sand-blasted the hull of a vessel moored in its facility, causing paint chips and sand to fall into Krum Bay near the main water intake for the St. Thomas desalinization plant. The toilet system on the *Witrollon*, the barge on which illegal Filipino workers were housed, discharged raw sewage directly into the bay. West Indies Transport also collected steel scrap from its repair operations and dumped it twelve miles out at sea under cover of darkness. West Indies Transport never obtained a permit for any of these pollution discharges.

App. 58-59 (127 F.3d at 303-04).

With respect to the enforcement of restitution, the district court found, in part:

> On April 19, 1999, a hearing was held, during which the Court heard evidence concerning the cost of the remediation that had been done and that remained to be done. While the parties agreed to the amount that Oelsner had expended in performing part of the clean-up, they disputed the amount of the projected cost for the remaining remediation. In light of this dispute, the Court declined to reduce the amount of restitution due and owing, stating that "once the clean-up is complete, Oelsner may move . . . to reduce the restitution amount indicated in the Oelsner judgment. Until that time, the amount will not be reduced." *United States v. West Indies Transport Co., Inc.*, 57 F.Supp.2d. 198, 202 (D. Virgin Islands 1998).

App. 23.

c. Statement of Lower Court Jurisdiction Under Rule 14.1(g)(ii)

The District Court of the Virgin Islands had subject matter jurisdiction of the underlying criminal case under 48 U.S.C. § 1612(a), (c); the indictment alleged federal offenses committed there. The court of appeals had jurisdiction under 28 U.S.C. § 1291.

REASONS FOR GRANTING THE WRIT

The court below departed from proper standards when it upheld the enforcement of a transparently illegal restitution order, even though that order was summarily upheld on direct appeal.

The petitioners were sentenced, *inter alia*, to pay over $1.4 million (to whom, the order did not say) to complete the clean-up of environmental damage to Krum Bay, St. Thomas, Virgin Islands. The federal sentencing statute expressly disallows restitution as a penalty for title 33 offenses such as those for which petitioners were convicted, permitting restitution as part of the sentence, with few and immaterial exceptions, only for title 18 offenses. 18 U.S.C. § 3663(a).[2] The sentencing court declared that a lien would attach, presumably under 18 U.S.C. § 3613,[3] to

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[2] *See* Statutes Involved, p. 3 *ante*.

[3] *See* Statutes Involved, pp. 4-6 *ante*. Differences between the terms of this provision as framed at the time of the offense, at the time of sentencing, and at the time of enforcement are not material to the issues raised in this petition.

each of 16 vessels with which petitioner Oelsner was "associated." The Third Circuit affirmed on direct appeal on the unprecedented and indefensible basis that the charging of 18 U.S.C. § 2(a) as a theory of liability in each count made the title 33 convictions ones for offenses under title 18, for which restitution could be ordered. App. 88.

While the individual petitioner was still completing his prison sentence, the government moved to enforce its statutory lien by attaching and executing on one of the listed vessels. The legal owner intervened, and the parties litigated the validity of the lien enforcement action. A hearing was held; petitioner Oelsner was able to participate by videoconference. The district court ordered the lien enforced against the vessel. App. 3. After the district court declined reconsideration, App. 16, the Third Circuit summarily affirmed. App. 1. This Court should grant certiorari and reverse, because the law of the case doctrine did not forbid the court below from reconsidering its appellate decision to uphold the invalid restitution order, and that illegal sentence should not be allowed to stand.

a. Notwithstanding a prior appellate affirmance, an illegal sentence should always be subject to re-examination when the government invokes the court's authority to enforce the judgment.

At sentencing in 1996, the district court imposed sentences on the three petitioners which included a requirement to pay $1.4 million in "restitution." Petitioners challenged this part of the sentence on appeal,

pointing out that their convictions were not for any offense for which restitution is an authorized term of a sentence. Under 18 U.S.C. § 3663(a), the district court, "when sentencing a defendant convicted of an offense under this title, or under subsection (h), (i), (j), or (n) of section 902 of the Federal Aviation Act of 1958 (49 U.S.C. 1472), may order, in addition to . . . any other penalty authorized by law, that the defendant make restitution to any victim of such offense." The offenses causing the damage which the petitioners were ordered to pay the cost of remediating were various violations of title 33, U.S. Code, not of title 18 (nor of the specified sections of title 49).[4] The court of appeals nevertheless affirmed, holding (in full) that:

> Restitution is authorized only for violations of Title 18 and some Title 49 provisions. *See* 18 U.S.C. § 3663. Defendants contend the trial court erred by ordering restitution for title 33 offenses. Our review is plenary. [citation omitted]
>
> Defendants' argument is meritless. Each Title 33 offense also charged a violation of 18 U.S.C. § 2. Restitution is authorized for violation of 18 U.S.C. § 2.

App. 88 (127 F.3d at 315).

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[4] Section 3663(a) was amended in 1996 to add certain drug offenses to the list of crimes for which restitution could be ordered, in connection with the creation of a new sort of "community restitution" sentence, but those provisions cannot be retroactive and in any event would have no applicability to this case. Even under the current statute, there is no authority to impose restitution as a penalty for any criminal violation of title 33.

In the enforcement proceedings, the district court refused to reconsider the legality of the restitution order or any issues decided on direct appeal.

> Th[e] defendants' present objections to the amount of the restitution award are barred by the mandate rule and the law of the case.[fn] Under these doctrines, a district court is precluded from reconsidering issues that have been decided either expressly or by necessary implication. [citations omitted]
>
> ---
>
> [fn] The mandate rule "bars a district court from 'reconsidering or modifying any of its prior decisions that have been ruled on by the court of appeals,' " [citations omitted], while the law of the case doctrine precludes a district court from reconsidering its own decisions in the same case absent extraordinary circumstances. [citation omitted]

App. 28; *see also* App. 44 ("a challenge to the validity of the judgment exceeds the scope of a hearing on a writ"). As noted, the court of appeals affirmed on this point. App. 2 ("the district court acted in full conformity with our prior opinion and thus we will affirm").

In deferring to the "law of the case," the courts below overlooked this Court's recognition that the rule must give way "where the initial decision was 'clearly erroneous and would work a manifest injustice.' " *Christianson v. Colt Industries Operating Corp.*, 486 U.S. 800, 817 (1988), quoting *Arizona v. California*, 460 U.S. 605, 618 n.8 (1983). See also *Dobbs v. Zant*, 506 U.S. 357 (1993) (per

curiam) (summarily reversing for failure to apply "manifest injustice" exception to law of the case rule). In any event, "A petition for writ of certiorari can expose the entire case to review." *Christianson*, 486 U.S. at 817.

Exercise of the power to reconsider the "law of the case" is particularly important where an illegal sentence is involved. Under the Federal Rules prior to 1987, an "illegal sentence" could be corrected "at any time." Fed.R.Crim.P. 35(a) (former vers.). Under the Sentencing Reform Act, this judicial power is purportedly severely restricted. *Cf.* 18 U.S.C. § 3582(c) (sentences of imprisonment). The remedy under 28 U.S.C. § 2255 has likewise been restricted, and may not in any event be available to grant relief which does not affect "custody." *Id.* Accordingly where, as here, the government chooses to invoke the district court's power to enforce and execute upon a sentence which the defendant claims is flatly illegal, the court should be encouraged to consider, not barred from hearing, arguments raised defensively which demonstrate the underlying unlawfulness of the term of the sentence sought to be implemented. The district court's equitable power to issue and enforce a writ of execution must not be exercised to perpetuate a clear error or to perpetrate a manifest injustice, such as enforcement of an illegal sentence.

For any of these reasons, this Court should grant the writ to correct the clear error and to prevent the manifest injustice in the court of appeals' ruling on direct appeal allowing restitution for the title 33 offenses.

b. The requirement of the sentence that petitioners must pay "restitution" for the cost of remediating environmental damage caused by criminal violations of title 33, U.S. Code, is plainly illegal, and the indictment's averment of aiding and abetting liability under 18 U.S.C. § 2 cannot bring the case within statutory language limiting restitution to offenses under title 18.

The provision of the judgments in this case that each of the three petitioners must pay up to $1.44 million in restitution is patently illegal in at least two ways. First, it is unauthorized by statute, because the offenses petitioners committed did not fall under title 18 (or title 49). Second, as amended to specify the United States as payee, App. 47-48, 55, the judgment does not direct payment "to any victim of such offense." 18 U.S.C. § 3663(a). This Court should grant certiorari to correct the court of appeals' blatant and illogical deviation from legality in federal sentencing.

The lower court's two-sentence disposition of this claim completely misses the mark: "Each Title 33 offense also charged a violation of 18 U.S.C. § 2. Restitution is authorized for violation of 18 U.S.C. § 2." App. 88. There is no such thing in federal criminal law as a "violation of 18 U.S.C. § 2." Section 2 of title 18 does not define an offense that someone can commit; it is a general provision stating most of the principles of individual liability that federal law recognizes for the commission of other

federal offenses,[5] each of which is and must be defined elsewhere in the U.S. Code:

> **§ 2. Principals**
>
> **(a)** Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.
>
> **(b)** Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

The main objective of this law, when enacted in 1909, was to abolish the technical, common law distinctions between accessories and principals, and between principals of different degree. *Standefer v. United States*, 447 U.S. 10, 16-20 (1980). The offense of which the aider and abettor is guilty – in which he is a "principal," in other words – is the underlying crime, which may or may not be found in title 18.

Section 2 itself does not define a crime at all.[6] *See Nye & Nissen Corp. v. United States*, 336 U.S. 613, 618-19 (1949)

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[5] The uncodified theory of substantive criminal liability is that recognized in *Pinkerton v. United States*, 328 U.S. 640 (1946).

[6] This is one of the ways that aiding and abetting differs from conspiracy. To conspire to commit an offense is to commit an entirely separate crime – one which may be found in title 18 (*see* 18 U.S.C. § 371) even if the object crime is not. See generally *United States v. Felix*, 503 U.S. 378 (1992) (substantive crime and conspiracy to commit it are two different offenses); accord, *Callanan v. United States*, 364 U.S. 587, 593 (1961); *Pereira v. United States*, 347 U.S. 1, 11-12 (1954); *Pinkerton v. United States*, 328 U.S. 640, 643-44 (1946).

(explaining aiding and abetting under § 2 as a "valid theory" making the defendant "responsible" for another's criminal act). The courts below thus flatly violated the limitations of § 3663(a) when they imposed and then affirmed the imposition of restitution in this case. Other circuits do not allow the same deviation from the terms of the restitution statute. *See United States v. Minneman*, 143 F.3d 274, 283-84 (7th Cir. 1998) (restitution not authorized for title 26 offense, but can be ordered for violation of 18 U.S.C. § 371 to commit that offense or related "conspiracy to defraud the United States"); *United States v. Helmsley*, 941 F.2d 71, 101 (2d Cir. 1991) (same).[7]

The restitution statute, as a law defining criminal punishment, must be strictly construed and enforced, with restitution limited to those offenses, and only in those circumstances, allowed by Congress. *Hughey v. United States*, 495 U.S. 411 (1990). Every defendant in every federal criminal case is a "principal" of one sort or another under § 2. The court of appeals' casual reliance on the reference to § 2 in each count of petitioners' indictment thus eliminated the entire meaning of the limiting introductory phrase of § 3663 by allowing restitution for offenses not covered there, on a theory that would apply to any and all federal charges.

The courts below also plainly erred by ordering and enforcing restitution to be paid to a federal agency which was not a "victim of such offense," that is, the offense of conviction. A governmental agency charged by law with

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[7] Although there was a conviction for a conspiracy to defraud the U.S. in an internal revenue matter in petitioners' case (Count XII), no restitution was ordered in that regard.

remediating a public harm is not "victimized" by private, illegal conduct which causes that harm. The agency's expenditures in fulfillment of its public duty are not "losses" of a crime victim. The Coast Guard, in particular, was not the "victim" of any criminal conduct which caused pollution to Krum Bay. Petitioners could, perhaps, have been fined with these costs in mind (in fact, very substantial fines were levied against the corporations), or have been required as a condition of supervised release or of probation to participate in the clean-up (as they have been actively doing in any event, as a way of reducing their residual obligation to pay under the district court's illegal order). They could not, however, have been properly ordered to make "restitution."

For these reasons, the Court should grant the requested writ of certiorari. The judgment of the court below upholding the seizure and sale of the Wittug must be reversed, and the case remanded with directions to strike the unlawful restitution requirements from the petitioners' judgments of sentence.

CONCLUSION

For the foregoing reasons, petitioners WEST INDIES TRANSPORT CO., INC., WIT EQUIPMENT CO., INC., and W. JAMES OELSNER pray that this Court grant their petition for a writ of certiorari to review the judgment and memorandum of the United States Court of Appeals for the Third Circuit upholding the district court's enforcement of the lien for restitution.

Respectfully submitted,

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May 18, 2001

UNREPORTED – NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 00-3449

UNITED STATES OF AMERICA

v.

WEST INDIES TRANSPORT CO., INC.;
WIT EQUIPMENT, CO., INC. and
W. JAMES OELSNER,

Appellants

On Appeal from the District Court of the Virgin Islands
(Division of St. Thomas and St. John)
(D.C. Crim. No. 93-00195)
District Judge: Honorable Stanley S. Brotman

Submitted under Third Circuit LAR 34.1(a)
December 7, 2000

BEFORE: MANSMANN, ALITO, and
GREENBERG, *Circuit Judges*

(Filed: Dec. 19, 2000)

MEMORANDUM OPINION OF THE COURT

GREENBERG, *Circuit Judge.*

West Indies Transport Co., Inc., Wit Equipment Co., Inc., and W. James Oelsner appeal from an order entered in the district court on April 3, 2000, denying Oelsner's

motion to quash or stay the government's writ of execution on the vessel Wittug and denying certain other relief. The district court set forth the background of the matter in its memorandum opinion accompanying the order. In addition, we set forth the background in our opinion on the direct appeal, *see United States v. West Indies Transport Co.*, 127 F.3d 299 (3d Cir. 1997), and the district court described later proceedings in the case in its opinion in *United States v. West Indies Transport Co.*, 57 F. Supp.2d 198 (D.V.I. 1999).

We have carefully reviewed this matter and have concluded that the district court acted in full conformity with our prior opinion and thus we will affirm. In reaching our result we emphasize our understanding that while Oelsner is liable for the entire amount of restitution ordered, nevertheless a rebate will be allowed for the difference between the restitution amount and the ultimate amount of the cleanup costs. Thus, the order for restitution does not provide for payment of an excessive amount.

The order of April 3, 2000, will be affirmed.

TO THE CLERK:

Please file the foregoing memorandum opinion.

DISTRICT COURT OF THE VIRGIN ISLANDS

UNITED STATES of America and Government of the Virgin Islands, Plaintiffs,

v.

WEST INDIES TRANSPORT CO., INC., Wit Equipment Co., Inc., and W. James Oelsner, Defendants.

WITWATER CORPORATION, Petitioner,

v.

MICHAEL E. MURPHY, in his capacity as Area Port Director for the United States Customs Service, Respondent.

No. CRIM. A. 93-195(STX).
No. CIV. A. 98-104(STT).

July 19, 1999.

James A. Hurd, Jr., United States Attorney, Curtis V. Gomez, Assistant U.S. Attorney, Federal Building & U.S. Courthouse, St. Thomas, VI, for U.S., Respondent Michael E. Murphy.

Treston E. Moore, Moore & Dodson, St. Thomas, VI, for Defendant W. James Oelsner.

Andrew C. Simpson, Bryant White & Barnes, P.C., St. Croix, VI, for Petitioner Witwater Corporation.

OPINION ON DEFENDANTS' MOTION TO QUASH AND OPPOSITION TO WRIT OF EXECUTION

OPINION ON MOTION OF WITWATER CORPORATION TO STAY OR QUASH EXECUTION OF WRIT

OPINION ON PETITION FOR ORDER OF MANDAMUS

BROTMAN, District Judge.

Presently before the Court are the following motions: (1) a motion filed by W. James Oelsner ("Oelsner") on behalf of all of the defendants to Criminal Action No. 93-195 to quash the writ of execution filed by the United States in that action; (2) a motion filed by Witwater Corporation ("Witwater") to stay or quash the writ of execution filed by the United States in Criminal Action No. 93-195; and (3) a petition for order of mandamus filed by Witwater in Civil Action No. 98-104.

I. *FACTS AND PROCEDURAL BACKGROUND*

On March 26, 1996, this Court entered a judgment against Oelsner ("Oelsner Judgment")[1] which imposed a prison sentence and required Oelsner to pay $1,440,450.00 in restitution[2] and $95,500 in fines. *See* Opp'n of the

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[1] The jury found Oelsner guilty of the following offenses: (1) violation of the Clean Water Act, 33 U.S.C. § 1311(a), 33 U.S.C. § 1319(c)(2)(A), 18 U.S.C. § 2; (2) violation of the Rivers and Harbor Act, 33 U.S.C. § 403, 33 U.S.C. § 406; (3) violation of the Ocean Dumping Act, 33 U.S.C. § 1411(a)(1), 33 U.S.C. § 1415(b)(1), 18 U.S.C. § 2; (4) conspiracy to defraud the United States, [18 U.S.C. § 371,] 26 U.S.C. §[§], 86[1](a)(3)[, 871(a)](1)(A); and (5) fraud, misuse of visas, 18 U.S.C. § 2, 18 U.S.C. § 1546. *See* United States' Opp'n, Attach. 2.

[2] With regard to the amount of restitution Oelsner was required to pay, the judgment stated as follows:

> The defendant shall pay restitution within Sixty (60) days from today's date provided, however, that if the costs of these cleanup efforts are less than the amount to which the Court made reference of $1,440,450.00, credit will be given to the defendants to that extent.

United States to the Emergency Mot. of Witwater Corporation to Intervene and to Stay or Quash Execution ("United States' Opposition"), Attach. 2. Also on March 26, 1996, this Court issued criminal judgments against West Indies Transport, Inc. ("West Indies") and WIT Equipment Co., Inc. ("WIT Equipment") in the same matter.[3] All three judgments contained identical lists of vessels and real estate that the Court determined were subject to liens. *See id.* Included in the list was the vessel Wittug. *See id.*

On April 16, 1996, the United States recorded a lien against the Wittug at the Recorder of Deeds, Division of St. Croix to satisfy the $1,440,450.00 judgment previously entered against Oelsner. *See id.*, Attach. 3. On November 9, 1998, the United States applied for a writ of execution on the Oelsner Judgment against the Wittug, serving Oelsner with a copy of the application by mail on November 10, 1998. Also on November 9, 1998, Witwater filed an emergency motion to intervene and to stay or quash execution of the writ. On November 12, 1998, this Court issued the writ. On November 23, 1998, Oelsner

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Any restitution payments made by defendants West Indies Transport, Inc. and/or WIT Equipment Co., Inc. shall be applied to reduce this amount accordingly. United States' Opp'n, Attach. 2.

[3] The Court ordered West Indies to pay $3,520,500.00 in fines and $1,440,450.00 in restitution. The Court ordered WIT Equipment to pay $1,520,500.00 in fines and $1,440,450.00 in restitution. In both the West Indies and the WIT Equipment judgments, the Court stated that any restitution payments made either by the company not subject to the judgment or by Oelsner would be applied to reduce the amount of restitution owed by the company subject to the judgment.

filed a motion to quash the writ of execution and to obtain a hearing on the matter.[4]

In addition to attempting to intervene in the United States' case against Oelsner, Witwater filed its own action regarding the Wittug. On May 22, 1998, Witwater filed a petition for order of mandamus, alleging that it owns the Wittug and that the United States Customs Service has wrongfully denied the Wittug clearance to depart St. Thomas, USVI where it is currently docked. *See* Pet. for Order of Mandamus, § § 6, 7, 9, 17. On August 7, 1998, the United States filed a motion to dismiss the petition, arguing that the Court lacked jurisdiction to issue an order of mandamus in such an action and that Witwater failed to exhaust its administrative remedies before filing the petition. On November 10, 1998, the Court heard argument on this motion and ordered that the hearing transcript be made part of the criminal action pending against Oelsner as well as part of the mandamus action Witwater initiated.

On December 16, 1998, the Court granted Oelsner's motion for a hearing on the writ of execution, permitting Witwater to intervene in the hearing for the limited purpose of challenging the writ. *See United States v. West Indies Transport Co., Inc.*, 35 F.Supp.2d 450, 455, 458 (D.V.I.1998). The Court stated that the hearing would be held for the purpose of determining the identity of the Wittug's owner, the value of the Wittug, and the cost of the remediation that remains to be done. *See id.* at 454,

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[4] Oelsner alone brought the motion to quash and to obtain a hearing, stating that the other corporate defendants are defunct. *See* Defs.' Mot. to Quash at 1, n.1.

458. At the same time, the Court denied the United States' motion to dismiss the petition for order of mandamus filed by Witwater in Civil Action No. 98-104. *See id.* at 457-58. Finally, the Court consolidated Criminal Action No.93-195 and Civil Action No. 98-104 to the extent that the hearing on the writ would be a joint hearing on the question of the ownership of the Wittug. *See id.* at 458-59.

The hearing was held on April 19, 1999 at the U.S. Attorney's Office in St. Croix, USVI. Oelsner appeared at the hearing via satellite transmission. On May 10, 1999, Oelsner filed a memorandum in support of his motion to reduce restitution.[5] *See* April 19, 1999 Hr'g Tr. at 104, 148 (giving parties leave to file post-hearing briefs clarifying the issues addressed at the hearing).

II. *DISCUSSION*

A. REQUEST FOR RESTITUTION REDUCTION

Oelsner has asked the Court to reduce the amount of restitution that is due and owing. *See* Defs.' Mot. to Quash, § 5; Def. Oelsner's Mem. in Supp. of his Mot. to Reduce Restitution. The Oelsner Judgment indicates that "if the costs of [the United States'] cleanup efforts are less than the [restitution] amount to which the Court made reference of $1,440,450.00, credit will be given to the defendants to that extent." United States' Opp'n, Attach. 2. The Act prohibits the use of a writ to execute judgment

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[5] Oelsner initially requested that the Court reduce the amount of restitution stated in the Oelsner Judgment in the motion to quash the writ of execution.

on property that exceeds in value the aggregate amount of the judgment. *See* 28 U.S.C.A. § 3203(c)(2)(B)(i) (West 1994).

At the April 19, 1999 hearing, the Court permitted Oelsner to introduce evidence regarding the cost of the remediation that has been done and that remains to be done. The parties agreed that Oelsner has spent $50,000 to date removing six vessels, specifically the Witislander, the Witrollon, the Waterhaul, the Witbarge III, the Witbarge II, and the Witbridge. *See* Def.'s Ex. 49; April 19, 1999 Hr'g Tr. at 24. Oelsner testified that he has spent an additional $20,000 to date preparing two additional vessels for removal, specifically the M/V Mar and the Witdock. *See* April 19, 1999 Hr'g Tr. at 47. Oelsner predicted that the remaining remediation will cost approximately $32,000. *See* Def. Oelsner's Mem. in Supp. of his Mot. to Reduce Restitution at 9. The United States disputes this figure. *See* April 19, 1999 Hr'g Tr. at 90-91 (Commander Brian Salerno, Commanding Officer of the Coast Guard Marin Safety Office in San Juan, Puerto Rico, testifying that it would cost more than $40,000 to "accomplish the type of clean up contemplated by the site assessment for the motor vehicle Mar and the WIT Dock"). In addition, the United States points out that Oelsner has failed to account for two vessels which he was required to remove: the Witconcrete II and the Witcargo. *See id.* at 53-56; Def.'s Ex. 22. According to Oelsner, the Army Corps of Engineers removed the Witconcrete II; Oelsner has not reimbursed the Army Corps of Engineers for the expense it incurred in removing the vessel. *See* April 19, 1999 Hr'g Tr. at 54-55. Oelsner also testified that the Witcargo has not been removed. *See id.* at 55.

Because there is uncertainty surrounding the cost of the remediation that remains to be done, the Court will presently decline to reduce the amount of restitution that is due and owing. Once the clean-up is complete, Oelsner may move the Court to reduce the restitution amount indicated in the Oelsner judgment. Until that time, the amount will not be reduced.

B. MOTIONS TO QUASH THE WRIT OF EXECUTION

Both Oelsner and Witwater challenge the United States' right to execute judgment on the Wittug. They argue that Witwater, not Oelsner, is the owner of the vessel. The United States filed an application for a writ of execution pursuant to the Federal Debt Collection Procedures Act of 1990 ("FDCPA") which permits the United States, as a judgment creditor, to levy pursuant to a writ of execution upon "[a]ll property in which the judgment debtor has a substantial nonexempt interest." 28 U.S.C. § 3203(a) (West 1994). A writ of execution may be challenged by an individual or entity claiming an ownership interest in the property. *See United States v. Coluccio*, 842 F.Supp. 663, 665 (E.D.N.Y. 1994) (resolving a challenge to a writ of execution issued pursuant to the FDCPA where ownership of the subject property was in dispute), *vacated on other grounds*, 51 F.3d 337 (2nd Cir.1995). In such a situation, the burden of proving ownership of the subject property is borne by the claimant, not the judgment creditor. *See id.* (analogizing to civil forfeiture laws). To prove ownership, the claimant must do more than demonstrate

that it is the record owner of the property; it must provide some evidence of control. *See United States v. One 1982 Porsche 928*, 732 F.Supp. 447, 451 (S.D.N.Y.1990) ("While ownership may be proven by actual possession, dominion, control, title and financial stake, '[t]he possession of bare legal title to the res may be insufficient,' absent other evidence of control or dominion over the property."); *see also United States v. One 1945 Douglas C-54 (DC-4) Aircraft*, (Appeal 2), 647 F.2d 864, 866 (8th Cir.1981); *United States v. One 1945 Douglas C-54 (DC-4) Aircraft*, (Appeal 1), 604 F.2d 27, 28-29 (8th Cir.1979); *United States v. One 1977 36 Foot Cigarette Ocean Racer*, 624 F.Supp. 290, 294-95 (S.D.Fla.1985); *United States v. One 1981 Datsun 280ZX*, 563 F.Supp. 470, 474 (E.D.Pa.1983). Ultimately, the claimant must prove that its alleged title to the property is superior to the judgment creditor's right to execute judgment on the property. *See, e.g., Baars v. Creary*, 23 Fla. 311, 314, 2 So. 662, 663 (stating that "[t]he purpose of the [Florida] claim statute is to provide a summary remedy for a stranger to an execution, who claims title to the property levied on, to have the question of the superiority of his alleged title, over the right to the plaintiff in execution to subject it to the satisfaction of his execution and judgment, settled.").

The Court finds that Witwater has failed to satisfy its burden of proof. Witwater presented sufficient evidence at the April 19, 1999 hearing for the Court to conclude that Witwater holds legal title to the Wittug. *See* Exs. B-1 (certified copy of the Wittug's certificate of ownership), B-2 (certified translation of the ownership certificate), and B-3 (copy of the Wittug's registry). Witwater, however, failed to present any evidence indicating that the

Wittug is under its control. At the hearing, the United States called as an expert witness John O'Connor ("O'Connor"), who, in October of 1995, authored a report for Price Waterhouse LLP that was used in Oelsner's sentencing. *See* April 19, 1999 Hr'g Tr. at 117. O'Connor testified that, as of October 31, 1995, Oelsner was the equitable owner of the Wittug. *See id.* at 129, 133 (Witwater is "one of several corporations that . . . held vessels that rolled up to Challenger, which ultimately rolled up to Oceanic and Finance, which was directed by Mr. Oelsner."). This testimony is consistent with the Price Waterhouse Report ("Report"), which the Court admitted into evidence.[6]

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[6] Witwater objected to the admission of the Report, arguing that the proper foundation had not been laid and that the document contained inadmissible hearsay. *See* April 19, 1999 Hr'g Tr. at 119, 149. The Court admitted the document over Witwater's objections. *See id.* at 149.

The Court finds that Witwater's hearsay objections are unfounded. O'Connor testified as to the information contained in the Report, and Witwater cross-examined O'Connor regarding his testimony. Witwater's foundation objections are equally without merit. An expert's testimony is admissible even where the facts or data on which he relies are not admitted into evidence. *See* Fed.R.Evid. 703.

Where testimony or a piece of evidence may assist the trier of fact, the rules of evidence favor the admission of that testimony or evidence. *See Kannankeril v. Terminix Int'l, Inc.*, 128 F.3d 802, 806 (3d Cir.1997). This preference holds true for expert testimony and reports, the admissibility of which is governed by Fed.R.Evid. 702. *See id.* Expert testimony and reports are admissible if they are both reliable and relevant. *See id.* O'Connor's explanation of the sources he consulted in order to prepare the Report are indicative of its reliability. *See* April 19, 1999 Hr'g Tr. at 121 (O'Connor reviewed "thousands of

At the hearing, Witwater challenged O'Connor's conclusion that Oelsner is the equitable owner of the Wittug on two grounds. First, Witwater asked whether O'Connor knew "whether or not Mr. Oelsner presently controls any of the assets [O'Connor] found that [Oelsner] controlled in October of '95." *Id.* at 137-38. Where a judgment lien has attached to property equitably owned by the judgment debtor, a third party deriving its interest from the equitable owner takes subject to the lien. *See* 46 Am.Jur.2d Judgments § 401 (1994). Therefore, Witwater's inquiry into the present equitable owner of the Wittug is irrelevant. Second, Witwater asked whether O'Connor was familiar with time charters, bare boat charters, and maritime agency arrangements,[7] implying that Oelsner's

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documents including banking documents, legal documents, appraisal documents, accounting documents, as well as, . . . interviewing Mr. Oelsner."); Ex. G- 5 at 8-9 ("To complete the work requested, I reviewed a significant number of documents related to business transactions, corporate structuring, corporate officers and statements made by W. James Oelsner under oath and during my interview with him. . . . The investigation/analysis conducted was clearly dominated by review of corporate records. These records have been received from Mr. Oelsner and third parties such as banks, accountants, corporate officers, and others familiar with Oelsner or his related companies. These corporate documents were reviewed for signs of ownership, control, interrelationships, and other attributes which may be meaningful in determining the ownership of certain assets and the validity of statements made by Mr. Oelsner with respect to his ownership of properties and vessels.").

[7] The difference between a time charter and a bare boat charter has been described as follows:

> A demise [or bare boat] charterer is "one who contracts for the vessel itself and assumes exclusive

interest in the Wittug was not an ownership interest but was the product of one of the foregoing. *See* April 19, 1999 Hr'g Tr. at 142-44. Despite the fact that the Court gave the parties leave to file post-hearing briefs, *see* April 19, 1999 Hr'g Tr. at 148, Witwater presented no evidence to the Court indicating that Oelsner and Witwater had entered into a time charter or a bare boat charter agreement with regard to the Wittug. The only evidence that supports Witwater's claim that Oelsner served as its agent is O'Connor's statement – confirmed by the Report – that Oelsner frequently signed as agent for Challenger Limited, the corporation that is the legal owner of Witwater Corporation. *See id.* at 145. The Court therefore concludes that Oelsner is the equitable owner of the Wittug and that this interest in the vessel is superior to the interest claimed by Witwater Corporation as the vessel's record owner.

The Court will order that judgment be executed on the Wittug.[8] Where a statute describes in broad terms the

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possession, control, command and navigation thereof for a specified period," *Stephenson v. Star-Kist Caribe, Inc.*, 598 F.2d 676, 679 (1st Cir.1979), in contrast to a time or voyage charterer who "contracts not for the vessel itself but for a specific service of the vessel, such as carriage of goods, which is rendered by the owner's master and crew," id.

McAleer v. Smith, 57 F.3d 109, 112-13 (1st Cir.1995). An agency relationship exists among individuals or entities where there "is a mutual interdependence of the financial credit and stability of each of the parties, agent and owner." *Compagnia Maritima La Empresa, S.A. v. Pickard*, 320 F.2d 829, 832 (5th Cir.1963).

[8] The Court is aware that judgment cannot be executed on property that exceeds the amount of the judgment. *See* 28 U.S.C.

property which is subject to levy, the statute is interpreted to include property in which the defendant's ownership interest is equitable in nature.[9] *See* 30 Am.Jur.2d Executions and Enforcement of Judgments § 176 (1994). The FDCPA is broadly drawn to subject to levy "[a]ll property in which the judgment debtor has a substantial nonexempt interest." 28 U.S.C. § 3203(a) (West 1994). The Court interprets this language to include that property in which the judgment debtor's interest is equitable.

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§ 3203(c)(3)(B) (West 1994). In its December 16, 1998 opinion and order, the Court instructed the parties that the April 19, 1999 hearing would be held for the purpose, among other things, of determining the Wittug's value. *See United States v. West Indies Transport Co., Inc.*, 35 F.Supp.2d 450, 454, 458 (D.V.I.1998). Despite this instruction, none of the parties has presented the Court with any evidence regarding the Wittug's value. Therefore, the Court will assume that the value of the Wittug does not exceed the amount of the judgment.

[9] Equitable ownership has been described as follows:

> An equitable estate, in its very conception, and as a fact, requires the simultaneous existence of two estates or ownerships in the same subject- matter, whether that be real or personal, – the one legal, vested in one person, and recognized only by courts of law; the second equitable, vested in another person, and recognized by courts of equity. These two interests must be separate, and as a rule, must be held by different persons; for if the legal estate and the equitable estate both become vested in the same person by the same right, then, as a general rule, a merger takes place, and the legal estate alone remains. . . . [T]he ownership of the equitable estate is regarded by equity as the real ownership, and the legal estate is . . . no more than the shadow always following the equitable estate.

1 Pomeroy's Equity Jurisprudence § 147 (5th ed. 1941).

C. PETITION FOR ORDER OF MANDAMUS

Witwater seeks an order of mandamus instructing Michael E. Murphy ("Murphy"), in his capacity as Area Port Director for the United States Customs Service, to grant clearance to the Wittug to depart St. Thomas. *See* Pet. for Order of Mandamus at 4. 28 U.S.C. § 1361 (West 1993) states that "district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff." The Third Circuit has determined that this provision "provide[s] relief only where a clear duty is owed the plaintiff or there is an abuse of discretion." *Grant v. Hogan*, 505 F.2d 1220, 1225 (3d Cir.1974).

Murphy is under no obligation to release the Wittug to Witwater. In fact, Murphy is prohibited from doing so. A vessel that is subject to a lien in favor of the United States may not be granted clearance to depart its port. *See* 34 O. Att'y Gen. 244 (1923). Having found that the United States' lien against the Wittug is valid and enforceable by way of levy, the Court must deny Witwater's petition for order of mandamus.

III. *CONCLUSION*

For the foregoing reasons, the Court will deny Oelsner's request to reduce restitution, deny both Oelsner's and Witwater's motions to quash the writ of execution, and deny Witwater's petition for order of mandamus. The United States may proceed to execute judgment by levying on the Wittug.

NOT FOR PUBLICATION

IN THE DISTRICT COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX -and-
DIVISION OF ST. THOMAS AND ST. JOHN

UNITED STATES OF AMERICA and GOVERNMENT OF THE VIRGIN ISLANDS, Plaintiffs, v. WEST INDIES TRANSPORT CO., INC., WIT EQUIPMENT CO., INC., and W. JAMES OELSNER, Defendants.	Criminal Action No. 93-195 (STX) **OPINION ON DEFENDANTS' MOTION TO QUASH WRIT OF EXECUTION** **OPINION ON MOTIONS OF WITWATER CORPORATION FOR NEW TRIAL AND TO SUPPLEMENT** [sic]
WITWATER CORPORATION, Petitioner, v. MICHAEL E. MURPHY, in his capacity as Area Port Director for the United States Customs Service, Respondent.	Civil Action No. 98-104 (STT)

APPEARANCES:

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BROTMAN, DISTRICT JUDGE (sitting by designation).

Presently before the Court are the following motions: (1) a motion filed by W. James Oelsner ("Oelsner") on behalf of all of the defendants to Criminal Action No. 93-195 to either quash or stay the writ of execution on the Wittug filed by the United States in that action; (2) a motion filed by Witwater Corporation ("Witwater") for a

new trial or to alter the judgment rendered by this Court in Criminal Action No. 93-195; and (3) a motion filed by Witwater to supplement its above motion for new trial. For the reasons discussed herein, each of these motions will be denied.

I. FACTS AND PROCEDURAL BACKGROUND

On March 26, 1996, this Court entered a judgment against Oelsner ("Oelsner Judgment")[1] which imposed a prison sentence and required Oelsner to pay $1,440,450.00 in restitution[2] and $95,500 in fines. Also on March 26, 1996, this Court issued criminal judgments against West

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[1] The jury found Oelsner guilty of the following offenses: (1) violation of the Clean Water Act, 33 U.S.C. § 1311(a), 33 U.S.C. § 1319(c)(2)(A), 18 U.S.C. § 2; (2) violation of the Rivers and Harbor Act, 33 U.S.C. § 403, 33 U.S.C. § 406; (3) violation of the Ocean Dumping Act, 33 U.S.C. § 1411(a)(1), 33 U.S.C. § 1415(b)(1), 18 U.S.C. § 2; (4) conspiracy to defraud the United States, [18 U.S.C. § 371,] 26 U.S.C. §[§] 86[1](a)(3)[, 871(a)](1)(A); and (5) fraud, misuse of visas, 18 U.S.C. § 2, 18 U.S.C. § 1546. *See* United States' Opp'n, Attach. 2.

[2] With regard to the amount of restitution Oelsner was required to pay, the judgment stated as follows:

> The defendant shall pay restitution within Sixty (60) days from today's date provided, however, that if the costs of these cleanup efforts are less than the amount to which the Court made reference of $1,440,450.00, credit will be given to the defendants to that extent.
>
> Any restitution payments made by defendants West Indies Transport, Inc. and/or WIT Equipment Co., Inc. shall be applied to reduce this amount accordingly.

United States' Opp'n, Attach. 2.

Indies Transport, Inc. ("West Indies") and WIT Equipment Co., Inc. ("WIT Equipment") in the same matter.[3] All three judgments contained identical lists of vessels and real estate that the Court determined were subject to liens. *See id.* Included in the list was the vessel Wittug.

On April 16, 1996, the United States recorded a lien against the Wittug at the Recorder of Deeds, Division of St. Croix to satisfy the $1,440,450.00 judgment previously entered against Oelsner. On November 9, 1998, the United States applied for a writ of execution on the Oelsner Judgment against the Wittug, serving Oelsner with a copy of the application by mail on November 10, 1998. Also on November 9, 1998, Witwater filed an emergency motion to intervene and to stay or quash execution of the writ. On November 12, 1998, this Court issued the writ. On November 23, 1998, Oelsner filed a motion to quash the writ of execution ("first motion to quash") and to obtain a hearing on the matter.

In addition to attempting to intervene in the United States' case against Oelsner, Witwater filed its own action regarding the Wittug. On May 22, 1998, Witwater filed a petition for order of mandamus, alleging that it owns the Wittug and that the United States Customs Service has wrongfully denied the Wittug clearance to depart St.

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[3] The Court ordered West Indies to pay $3,520,500.00 in fines and $1,440,450.00 in restitution. The Court ordered WIT Equipment to pay $1,520,500.00 in fines and $1,440,450.00 in restitution. In both the West Indies and the WIT Equipment judgments, the Court stated that any restitution payments made either by the company not subject to the judgment or by Oelsner would be applied to reduce the amount of restitution owed by the company subject to the judgment.

Thomas, USVI where it is currently docked. On August 7, 1998, the United States filed a motion to dismiss the petition, arguing that the Court lacked jurisdiction to issue an order of mandamus in such an action and that Witwater failed to exhaust its administrative remedies before filing the petition. On November 10, 1998, the Court heard argument on this motion and ordered that the hearing transcript be made part of the criminal action pending against Oelsner as well as part of the mandamus action Witwater initiated.

On December 16, 1998, the Court granted Oelsner's motion for a hearing on the writ of execution, permitting Witwater to intervene in the hearing for the limited purpose of challenging the writ. *See United States v. West Indies Transport Co., Inc.*, 35 F.Supp.2d 450, 455, 458 (D.N.J. [sic] 1998). The Court stated that the hearing would be held for the purpose of determining the identity of the Wittug's owner, the value of the Wittug, and the cost of the remediation that remains to be done. *See id.* at 454, 458. At the same time, the Court denied the United States' motion to dismiss the petition for order of mandamus filed by Witwater in Civil Action No. 98-104. *See id.* at 457-58. Finally, the Court consolidated Criminal Action No. 93-195 and Civil Action No. 98-104 to the extent that the hearing on the writ would be a joint hearing on the question of the ownership of the Wittug. *See id.* at 458-59.

The hearing was held on April 19, 1999 at the U.S. Attorney's Office in St. Croix, USVI. Oelsner appeared at the hearing via satellite transmission. On May 10, 1999, Oelsner filed a memorandum in support of his motion to reduce restitution. *See* April 19, 1999 Hr'g Tr. at 104, 148 (giving parties leave to file post-hearing briefs clarifying the issues addressed at the hearing).

In an Opinion and Order dated July 19, 1999, the Court denied the following motions: (1) Oelsner's motion to quash the writ of execution filed by the United States in Criminal Action No. 93-195; (2) Witwater's motion to stay or quash the same writ of execution; and (3) Witwater's petition for order of mandamus in Civil Action No. 98-104. In addition, the Court denied without prejudice Oelsner's motion to reduce the amount of restitution that he owes pursuant to the judgment entered in Criminal Action No. 93-195.

Now before the Court is (1) a second motion by Oelsner to quash or stay the government's writ of execution; (2) motion by Witwater for a new trial or amendment of the judgment rendered in Criminal Action No. 93-195; and (3) a second motion filed by Witwater to supplement its original motion for new trial.

II. DISCUSSION

A. Defendants' Motion to Quash or Stay the Government's Writ of Execution on the Wittug[4]

Oelsner, on behalf of all defendants, requests relief from the March 26, 1996 judgment ordering defendants to

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[4] Defendant Oelsner has also filed a motion to quash the Government's writ of execution on four additional vessels ("the second writ") – WITSERVICE, WITSERVICE II, WITPOWER, and WITPOWER II. In addition, Witservice Ltd. and Witpower Ltd., two British Virgin Islands corporations have filed motions for leave to intervene, claiming ownership of these vessels. Because execution of the second writ may involve matters separate and distinct from the instant motions concerning execution on the Wittug, the Court leaves for another day resolution of those motions.

pay to the Government $1,440,450 (one million four-hundred forty thousand four-hundred fifty dollars) in restitution. Specifically, Oelsner requests a second time that the Court quash or stay the Government's writ of execution on the Wittug, alleging the judgment is defective as a matter of law. To support this relief, Oelsner argues that (1) the judgment is not final, and thus the writ of execution against the Wittug is premature; (2) the judgment is defective for the Court's failure to make specific findings of fact with respect to the amount of restitution; (3) the restitution award is excessive as it includes amounts for

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Respecting the instant motion, on March 16, 2000, Oelsner filed a submission titled, "Clarification of Pleadings and Reply to Government's Response to Defendants' Motion to Quash or Stay Execution" ("reply"). Therein, Oelsner states two additional grounds, which were not raised in his original supporting memorandum, for quashing the writ for the Wittug. Specifically, Oelsner argues that (1) the Government is attempting to execute on property that far exceeds the amount of the restitution judgment and (2) the Government should be estopped from executing on the judgment for allegedly interfering with Oelsner's remediation efforts. *See* Reply at 3-4. The Court, however, will not consider these arguments as they pertain to execution on the Wittug. First, these matters were not set forth in the supporting memorandum but were raised for the first time in defendants' reply. *See, eg., Gambino v. E.W. Morris*, 134 F.3d 156, 161 n.10 (3d Cir. 1998); *Schiffli Embroidery Workers Pension Fund*, 869 F. Supp. 278, 281 n.1 (D.N.J. 1994). Second, Oelsner did not raise these challenges during his first motion to quash or stay execution on the Wittug, which the Court denied in an opinion dated July 22, 1999. These additional arguments, as they relate to the Wittug, are accordingly barred by the law of the case. *See* cases cited *infra* part II.A.3. Therefore, the Court addresses herein only those arguments expressly raised by Oelsner in his December 3, 1999 motion to quash the writ of execution on the Wittug.

losses unrelated to the offenses for which defendants were convicted; and (4) the offenses for which defendants were convicted constitute or are analogous to "no clear victim" crimes and thus, the amount of restitution is limited to the amount imposed by the Court for fines.

1. The Judgment is a Final Judgment

On March 26, 1996, the Court ordered the defendants to pay $1,440,450 in restitution to offset the costs of cleaning up their environmental damage, "provided, however, that if the costs of these clean-up efforts are less than . . . $1,440,450, credit will be given to the defendants to that extent." Tr. of Hearing, pp. 87-88. Pursuant to this order, Oelsner moved for reduction of the restitution amount on November 12 1998. On April 19, 1999, a hearing was held, during which the Court heard evidence concerning the cost of the remediation that had been done and that remained to be done. While the parties agreed to the amount that Oelsner had expended in performing part of the clean-up, they disputed the amount of the projected cost for the remaining remediation. In light of this dispute, the Court declined to reduce the amount of restitution due and owing, stating that "once the clean-up is complete, Oelsner may move . . . to reduce the restitution amount indicated in the Oelsner judgment. Until that time, the amount will not be reduced." *United States v. West Indies Transport Co., Inc.*, 57 F.Supp.2d. 198, 202 (D.Virgin Islands 1998).[5]

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[5] To date, neither the Coast Guard nor defendant Oelsner has informed the Court that remediation has been completed.

Oelsner now challenges the finality of the Court's order of restitution, claiming, "The fact that the original Judgment issued at sentencing contained the contingency that the amount of $1,440,450.00 would be subject to setoff based on the actual cost of clean up, and the fact that the July 19, 1999 order made the restitution amount further contingent upon a setoff for the work performed by the Defendants, make it clear that the Judgment is not a "final judgment" for purposes of a civil collection." Defs.' Supp. Br. at 3. Thus, Oelsner claims that the restitution order should be treated as a civil judgment governed by civil judgments finality rules. *Id.* at 2-3 ("The Writ of Execution filed in this proceeding effectively transformed the criminal order of restitution into a civil judgment."). The Court of Appeals for the Third Circuit, however, has determined that the civil enforcement of a criminal restitution order does not "transform[ ] that order into a civil judgment." *United States v. Palma*, 760 F.2d 475, 479 (3d Cir. 1985) (holding that restitution order imposed under Victim Witness Protection Act, 18 U.S.C. §§ 3579, constitutes criminal penalty and therefore is "not subject to the jury trial guarantee of the Seventh Amendment"). Moreover, in a published opinion, the Third Circuit upheld the instant restitution order, finding that this Court did not abuse its discretion. *United States v. West Indies Transport, Inc.*, 127 F.3d 299, 315 (3d Cir. 1997). In doing so, the Third Circuit implicitly held that the order constituted a final judgment authorizing appellate review. *Id.*

Moreover, in affirming the order of restitution, the Third Circuit acknowledged that the restitution amount was subject to reduction:

> The district court calculated restitution based on Coast Guard estimates of the costs required to clean defendants' environmental damage. The district court also ordered that if the ultimate cost of the clean up is lower than the Coast Guard estimate, any amount over the actual costs shall be returned to the defendants.

Id. The Third Circuit concluded that "This sensible approach appears appropriate and does not constitute an abuse of discretion." *Id.* Accordingly, this Court rejects Oelsner's argument that the restitution order lacks finality, and therefore is defective as a matter of law.

2. Findings of Fact Respecting Restitution Order

Oelsner also asserts that the Court failed to make appropriate findings when it ordered restitution. In determining whether to order restitution, a court "shall consider the amount of the loss sustained by any victim as a result of the offense, the financial resources of the defendant, the financial needs and earning ability of the defendant and the defendant's dependents, and [other appropriate factors]. 18 U.S.C. § 3664, *amended by* 18 U.S.C. § 3664 (1996). Defendants did not include this challenge in its appeal to the Third Circuit, which affirmed the order of restitution. *See West Indies Transport, Inc.*, 127 F.3d at 315. Nor did defendants raise this issue at the April 19, 1999 hearing on defendants' first motion to quash the government's writ. Accordingly, this argument has been waived.

Moreover, notwithstanding defendants' assertions to the contrary, the Court, at sentencing, did issue findings

as to the need for and amount of restitution, stating, "[T]he Coast Guard, after having given allowance to everything that this defendant has done in terms of clean-up, finds that it would . . . still take $1,440,450 to complete. I will accept that figure." Tr. at 87. In addition, the Court issued extensive findings respecting defendants' ability to pay the restitution amount:[6]

> Defendant W. James Oelsner has directed and controlled all the assets held by all of the corporations listed in Exhibit 27 of the financial report of the Price, Waterhouse certified public accountant, and I find that he is the owner of the assets set forth below.
>
> These assets include commercial boats valued between $3 million and $5 million; real estate located in St. Thomas, USVI; an expectation interest in insurance recoveries caused by Hurricanes Hugo and Marilyn, the real estate located in Oyster Bay, New York, valued between $4.5 and 26 million. [ ]

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[6] In his reply, Oelsner asserts that the Court's findings concerning his ability to pay were erroneous, because the basis for these findings, the report of John J. O'Connor, is "biased and inaccurate." Reply Br. at 5. Oelsner also challenges Mr. O'Connor's competency in admiralty law and further alleges, "[his] report even fails to comply with accounting standards that govern his profession." *Id.* To bolster these assertions, Oelsner attaches a report by Stanley I. Foodman, CPA, dated March 16, 2000, which purports to reveal errors in Mr. O'Connor's report. *See* Reply Br., Ex. A. Oelsner's reliance on Foodman's report, however, is too little too late. This report was submitted for the first time with the reply on March 16, 2000, almost four years after the Court's judgment and findings, and eleven months after the April 19, 1999 hearing on the first motion to quash.

> I find that the defendants have the ability to pay any restitution or fines which the Court may order. [ ].
>
> The Court further finds that the defendants are able to earn substantial sums of money, sums that are far in excess of the stated incomes listed in the presentence report.
>
> W. James Oelsner lists his salary as $80,000 per annum. However, expert testimony established that the present costs of his lifestyle significantly exceeds that salary.
>
> Moreover, Exhibit 27 establishes that he regularly organizes and completes multi-million dollar transactions in the shipping business. Defendant Oelsner is in good health, and has been actively engaged in his business. Barring an unforseen change in circumstances, he should be able to continue to work in his business.
>
> Finally, Defendant Oelsner has no financial debts, and I find that he does have, as I stated, had the earning capacity and the assets to pay for any restitution of fines ordered in this case.

Tr. at 83-85. Therefore, defendants' assertion that the Court's findings were insufficient is without merit.

3. Calculation of the Restitution Amount

As additional grounds for quashing the government's writ of execution on the Wittug, Oelsner challenges the Court's method or process in calculating the amount of the restitution award. Specifically, Oelsner claims that the Court improperly included in the restitution judgment amounts for losses which do not directly

relate to the conduct for which defendants were convicted. Moreover, Oelsner argues that the offenses for which he was convicted constitute crimes having no clear victim within the meaning of 18 U.S.C. § 3663, and thus the restitution amount must be limited to the amount of fines imposed by the Court.[7]

As previously mentioned, the Third Circuit has affirmed the instant restitution order against challenges by defendants concerning the restitution amount. *See United States v. West Indies*, 127 F.3d at 315. In that appeal, "Defendants . . . impl[ied], though they d[id] not clearly argue, that the amount of restitution was excessive given the amount of environmental damage caused by their criminal conduct." *Id.* The Third Circuit rejected defendants' argument, finding that the restitution award was "appropriate and [did] not constitute an abuse of discretion." *Id.* Thus, defendants' present objections to the amount of the restitution award are barred by the mandate rule and the law of the case.[8] Under these doctrines, a district court is precluded from reconsidering issues that have been decided either expressly or by necessary implication. *See, e*[.]*g., Bolden v. Septa*, 21 F.3d 29, 31 (3d

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[7] As the Court ordered Oelsner to pay $95,500 in fines, he argues that the restitution order is limited to this amount.

[8] "The 'mandate rule' bars a district court from 'reconsidering or modifying any of its prior decisions that have been ruled on by the court of appeals,' " *Robert Billet Promotions, Inc.*, 1998 WL 721081 at *5 (quotation omitted), while the law of the case doctrine precludes a district court from reconsidering its own decisions in the same case absent extraordinary circumstances. *See, e.g., General Refractories Co.*, 1998 WL 961380 at *4.

Cir. 1994); *Pension Benefit Guaranty Corp. v. White Consolidated Industries, Inc.*, 1999 WL 680185 (W.D. Pa. July 21, 1999); *General Refractories Co. v. Travelers Insur. Co.*, 1998 WL 961380 (E.D. Pa. Dec. 15, 1998); *Robert Billet Promotions, Inc. v. IMI Cornelius, Inc.*, 1998 WL 721081 (E.D. Pa. Oct. 14, 1998). In concluding that the restitution award was not excessive "given the amount of environmental damage caused by [defendants'] criminal conduct," the Third Circuit necessarily determined by implication that the restitution award properly related to losses caused by defendants' criminal conduct to which the government was a victim eligible for recompense.[9]

Furthermore, defendants have waived these arguments by failing to raise them during the April 19, 1999 hearing on their first motion to quash. While the law of the case doctrine permits review of issues under extraordinary circumstances, *see Bolden v. Septa*, 21 F.3d 29, 31 (3d Cir. 1994); *Pension Benefit Guaranty Corp. v. White Consolidated Industries, Inc.*, 1999 WL 680185 (W.D. Pa. July 21, 1999); *General Refractories Co. v. Travelers Insur. Co.*, 1998 WL 961380 (E.D. Pa. Dec. 15, 1998); *Robert Billet Promotions, Inc. v. IMI Cornelius, Inc.*, 1998 WL 721081 (E.D. Pa. Oct. 14, 1998), the Court finds no such circumstances here.

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[9] Assuming *arguendo* that the ruling by the Third Circuit affirming the restitution order did not encompass defendants' current challenges, defendants failed to expressly raise these challenges on direct appeal, thereby waiving them. *See Cowgill v. Raymark Industries, Inc.*, 832 F.2d 798, 802 (3d Cir. 1987); *Pension Benefit Guaranty Corp.*, 1999 WL 680185 at *34.

Based on the reasons stated above, defendants' motion to quash or stay the government's writ of execution on the Wittug will be denied.

B. Witwater's Motion for New Trial

Fed. R. Civ. P. 59(a) provides in pertinent part:

> A new trial may be granted to all or any of the parties and on all or part of the issues (2) in an action tried without a jury, for any of the reasons for which rehearings have heretofore been granted in suits in equity in the courts of the United States. On a motion for a new trial in an action tried without a jury, the court may open judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.

A motion for a new trial is not a proper vehicle for an "unsuccessful party to 'rehash' the same arguments and facts previously presented." *Keyes v. National Railroad Passenger Corp.*, 766 F.Supp. 277 (E.D. Pa. 1991); *see also Ball v. Interoceanica Corp.*, 71 F.3d 73, 76 (2d. Cir. 1995) (" 'A trial court should not grant a new trial merely because the losing party can probably present a better case on another trial.' ") (quotation omitted). Instead, such motion 'should be based upon manifest error of law or mistake of fact, and a judgment should not be set aside except for substantial reasons." 11 Charles A. Wright et al., MOORE'S [sic] FEDERAL PRACTICE & PROCEDURE § 2804, at 53 (2d ed. 1995). In considering a motion for new trial, the trial judge is afforded wide discretion.

Keystone Floor Products Co. v. Beattle Mfg. Co., 432 F.Supp. 869, 877 (E.D. Pa. 1977).

Witwater asserts two separate bases in support of its motion for new trial: (1) that the Court erred as a matter of law in placing on Witwater the burden of proving actual ownership and control of the Wittug and (2) that the Court erred as a matter of fact in finding that Oelsner had asserted sufficient control over the Wittug to obtain equitable ownership thereof. These arguments are without merit.

1. Allocation of Burden of Proof

In the July 19, 1999 Opinion, this Court stated as a matter of law that any person or entity claiming an ownership interest in property in which the United States, as judgment creditor, seeks to levy bears the burden of proving such ownership. 57 F.Supp.2d 198 (citing to *United States v. Coluccio*, 842 F.Supp. 663, 665 (E.D.N.Y. 1994), *vacated on other grounds*, 51 F.3d 337 (2d Cir. 1995)). With regard to this burden, the Court explained that a demonstration of legal title to the property was insufficient, as "the record owner of the property . . . [also] must provide some evidence of control." *Id.* Acknowledging that Witwater did hold legal title to the Wittug, this Court nonetheless found that Witwater had not satisfied its burden of proof, as it presented no "evidence indicating that the Wittug [was] under its control." *Id.* In its four-page brief in support of a new trial, Witwater asserts that the Court committed prejudicial error in requiring Witwater "to disprove the Government's claim that Oelsner

controlled the [Wittug]." Witwater's Supp. Br. at unnumbered p. 2. Witwater argues that upon its proof of legal title to the Wittug, the Court should have shifted to the United States the ultimate burden of proving Oelsner's control of the vessel and resulting equitable title thereto.

Fatal to Witwater's argument is its obvious failure to provide any legal authority to support this position. A motion for new trial carries with it a substantial burden. Clearly, an unsubstantiated allegation that the Court erred as a matter of law woefully fails to satisfy such burden. In light of Witwater's neglect to cite to any authority to the contrary, this Court affirms its holding with respect to burden allocation as set forth in the July 19, 1999 Opinion.

2. Evidence [C]oncerning Agency/Control

As alternative grounds for a new trial, Witwater argues that the Court's finding that Oelsner obtained equitable ownership of the Wittug was inconsistent with the weight of the evidence. First, Witwater argues that certain exhibits submitted at the hearing demonstrate that Oelsner was not the equitable owner of the Wittug.

Relying on Oelsner's Exhibits 40, 41, 42, 46, 47 and 48,[10] Witwater claims "[t]hese documents refute the Price-

[10] Exhibit 40 is an affidavit of Carl Janson, whom Oelsner alleges and the affiant claims is the owner of Oceanic and Finance Corporation. This affidavit was taken in support of a motion to dismiss claims filed in a separate, unrelated civil action in the District of Puerto Rico.

Waterhouse report claiming that Oelsner controlled Challenger Limited" and also establish that Oelsner acted as agent of "many companies." Witwater Supp. Br. at 2. However, with the exception of exhibit 47, Witwater fails to provide any explanation as to how these documents "refute the Price-Waterhouse report" or establish Oelsner's role as agent, and the Court finds no indications of its own.[11]

Exhibit 41 is a copy of a share certificate for West Indies Transport Co., Inc. dated November 18, 1966, wherein Oceanic and Finance Corporation is named the owner of 10 (ten) shares of West Indies Transport capital stock.

Exhibit 42 is a copy of a share certificate for WIT Equipment Co., Inc. dated August 10, 1992, wherein Americo Pagliughi is named the owner of 10 (ten) shares.

Exhibit 46 is an addendum to an agreement entered into by Continental Shipping Corp, Compania Columbiana de Navegacion Maritima, and Oceanic Operations Corp. The signature representing the interests of Oceanic Operations Corp. reads, "W. James Oelsner." The original agreement to which the addendum applies has not been provided to the Court.

Exhibit 47 is an agency agreement dated October 1, 1980 appointing West Indies Transport Co., Inc. as agent for West Indies Transport LTDA., S.A. The signature, "W. James Oelsner" appears on the line representing the interests of West Indies Transport Co.

Exhibit 48 is an agency agreement dated October 1, 1994 appointing Puerto Rico Operations Inc. as agent for West Indies Transport LTDA., S.A. Mr. Oelsner's signature does not appear anywhere in the agreement.

[11] It should be noted that it is hardly expeditious or appropriate for the Court to sift, post-trial, through various documents of record absent explication by the proponent concerning the document's specific relevance and contribution

Exhibit 47, an agency agreement between West Indies Transport LTD. and West Indies Transport Co., Inc., is the only document for which Witwater provides any analysis, the extent of which is as follows:

> For example, Exhibit 47 establishes Oelsner's appointment as agent for West Indies Transport LTD A.S.A., a company that "manages" Challenger Limited, Charter Transport Line, and West Indies Transport, Co., Inc., among other companies. It is undisputed that West Indies Transport Company, Inc. acted as agent for the *Wittug* in St. Thomas.

Id. at 3 (emphasis in original). From this, Witwater concludes, "Clearly, Witwater did establish evidence of agency relationship with Oelsner. This evidence also refutes the *perception* of control in the nature of ownership that is unsupported, but alluded to, in the Pricewater House Report." (emphasis in original).

The Court, however, reviewed exhibit 47 before issuing its June 19, 1999 Opinion and Order wherein it found Oelsner to be the equitable owner of the Wittug. At that time, the Court determined that exhibit 47 did not support a different conclusion, and the Court, now reviewing the document a second time, finds no error in its original determination.

Finally, Witwater seeks to supplement the record with several exhibits which purport to demonstrate that Oelsner acted as agent for Witwater. At the conclusion of the April 19, 1999 hearing, the Court indicated that the

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to the proponent's legal argument. This Witwater has failed to do.

parties could submit post-hearing briefs. *See* April 19, 1999 Hearing Tr. at 148. Despite this invitation, Witwater filed no post-hearing brief. Witwater now requests, some time after issuance of the Court's opinion determining that Oelsner equitably owned the Wittug, that the Court consider these new exhibits and grant a new trial. This the Court declines to do. Witwater has provided no reasons for failing to proffer these documents at the April 19, 1999 hearing. Nor were these documents provided, as attachments to a post-hearing brief, to the Court for review.[12] By failing to present this evidence both at the hearing and during the time allotted for the filing of post-hearing briefs, Witwater foreclosed any opportunity it may have had for the Court's consideration of this evidence. As a result, the Court will not review the new exhibits.

C. Witwater's Motion to Supplement its Motion for New Trial

On November 9, 1999 Witwater filed a motion to supplement its motion for new trial to include three additional exhibits, which purported to establish the existence of an agency relationship between Oelsner and Witwater, that are not part of the record. For the reasons

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[12] As explanation for failing to file a post-trial brief containing these documents, Witwater states, "Witwater's counsel did not understand that post-trial briefing included permission to supplement the record with additional evidence (a somewhat unusual procedure) and a review of the record does not indicate a specific invitation to add additional record to the evidence." Witwater's Supp. Br. at 3.

stated above, Witwater's motion to include these documents, which were neither proffered at the April 19, 1999 hearing nor submitted with a post-hearing brief, will be denied.

As Witwater has failed to present to the Court compelling reasons justifying a new trial, its motion for a new trial will be denied. Moreover, Witwater's request to amend the judgment also will be denied for failure to present any arguments supporting this relief.

III. CONCLUSION

For the reasons stated herein, Defendants' motion to quash or stay the writ of execution on the Wittug will be denied, Witwater's motion for a new trial will be denied, and Witwater's motion to supplement its motion for a new trial also will be denied. The Court will enter an appropriate order.

Dated: March 24, 2000

/s/ S. Brotman
HON. STANLEY S. BROTMAN
UNITED STATES DISTRICT JUDGE
(Sitting by Designation)

ATTEST:
ORINN F. ARNOLD
Clerk of the Court

By: _____
Deputy Clerk

cc: James A. Hurd, Jr., Esq., United States Attorney
Curtis V. Gomez, Esq., Assistant U.S. Attorney
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DISTRICT COURT OF THE VIRGIN ISLANDS,
Division of St. Croix.

UNITED STATES of America and Government of the Virgin Islands, Plaintiffs,

v.

WEST INDIES TRANSPORT CO., INC., Wit Equipment Co., Inc., and W. James Oelsner, Defendants.
WITWATER CORPORATION, Petitioner,

v.

MICHAEL E. MURPHY, in his capacity as Area Port Director for the United States Customs Service, Respondent.

CRIM. A. No. 93-195.
CIV. A. No. 98-104.

Dec. 16, 1998.

James A. Hurd, Jr., United States Attorney, Curtis V. Gomez, Assistant U.S. Attorney, Charlotte Amalie, St. Thomas, VI, for Plaintiff United States of America.

Treston E. Moore, Moore & Dodson, St. Thomas, VI, for Defendant W. James Oelsner.

Andrew C. Simpson, Bryant White & Barnes, P.C., St. Croix, VI, for Petitioner Witwater Corporation.

Curtis Gomez, Assistant U.S. Attorney, *James S. Carroll*, Assistant U.S. Attorney, Charlotte Amalie, St. Thomas, VI, for Respondent Michael E. Murphy.

OPINION ON DEFENDANTS' MOTION TO QUASH AND OPPOSITION TO WRIT OF EXECUTION AND DEFENDANTS' MOTION TO STAY AND CONSOLIDATE AND DEMAND FOR HEARING

OPINION ON MOTION OF WITWATER CORPORATION TO INTERVENE AND TO STAY OR QUASH EXECUTION OF WRIT OPINION ON MOTION TO DISMISS

BROTMAN, District Judge, Sitting by Designation.

Presently before the Court are the following motions: (1) a motion filed by W. James Oelsner ("Oelsner") on behalf of all of the defendants to Criminal Action No. 93-195 to quash the writ of execution filed by the United States in that action and to be granted a hearing on this matter; (2) a motion filed by Witwater Corporation ("Witwater") to intervene and to stay or quash the writ of execution filed by the United States in Criminal Action No. 93-195; and (3) a motion to dismiss filed by the United States in Civil Action No. 98-104.

I. *FACTUAL AND PROCEDURAL BACKGROUND*

On March 26, 1996, this Court entered a judgment against Oelsner ("Oelsner Judgment")[1] which imposed a

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[1] The jury found Oelsner guilty of the following offenses: (1) violation of the Clean Water Act, 33 U.S.C. § 1311(a), 33 U.S.C. § 1319(c)(2)(A), 18 U.S.C. § 2; (2) violation of the Rivers and Harbor Act, 33 U.S.C. § 403, 33 U.S.C. § 406; (3) violation of the Ocean Dumping Act, 33 U.S.C. § 1411(a)(1), 33 U.S.C. § 1415(b)(1), 18 U.S.C. § 2; (4) conspiracy to defraud the United States, [18 U.S.C. § 371,] 26 U.S.C. §[§] 86[1](a)(3)[, 871(a)](1)(A); and (5) fraud, misuse of visas, 18 U.S.C. § 2, 18 U.S.C. § 1546. *See* United States' Opposition, Attach. 2.

prison sentence and required Oelsner to pay $1,440,450.00 in restitution[2] and $95,500 in fines. *See* Opposition of the United States to the Emergency Motion of Witwater Corporation to Intervene and to Stay or Quash Execution ("United States' Opposition"), Attach. 2. Also on March 26, 1996, this Court issued criminal judgments against West Indies Transport, Inc. ("West Indies") and WIT Equipment Co., Inc. ("WIT Equipment") in the same matter.[3] All three judgments contained identical lists of vessels and real estate associated with the defendants that the Court determined were subject to liens. *See id.* Included in the list was the vessel Wittug. *See id.*

On April 16, 1996, the United States recorded a lien against the Wittug at the Recorder of Deeds, Division of

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[2] With regard to the amount of restitution Oelsner was required to pay, the judgment stated as follows:

> The defendant shall pay restitution within Sixty (60) days from today's date provided, however, that if the costs of these cleanup efforts are less than the amount to which the Court made reference of $1,440,450.00, credit will be given to the defendants to that extent. Any restitution payments made by defendants West Indies Transport, Inc. and/or WIT Equipment Co., Inc. shall be applied to reduce this amount accordingly.

United States' Opposition, Attach. 2.

[3] The Court ordered West Indies to pay $3,520,500.00 in fines and $1,440,450.00 in restitution. The Court ordered WIT Equipment to pay $1,520,500.00 in fines and $1,440,450.00 in restitution. In both the West Indies and the WIT Equipment judgments, the Court stated that any restitution payments made either by the company not subject to the judgment or by Oelsner would be applied to reduce the amount of restitution owed by the company subject to the judgment.

St. Croix to satisfy the $1,440,450.00 judgment previously entered against Oelsner. *See id.*, Attach. 3. On November 9, 1998, the United States applied for a writ of execution on the Oelsner Judgment against the Wittug, serving Oelsner with a copy of the application by mail on November 10, 1998. Also on November 9, 1998, Witwater Corporation ("Witwater") filed an emergency motion to intervene and to stay or quash execution of the writ. On November 12, 1998, this Court issued the writ. On November 23, 1998, Oelsner filed a motion to quash the writ of execution and to obtain a hearing on the matter.[4]

In addition to attempting to intervene in the United States' case against Oelsner, Witwater has filed its own action regarding the Wittug. On May 22, 1998, Witwater filed a petition for order of mandamus, alleging that it owns the Wittug and that the United States Customs Service has wrongfully denied the Wittug clearance to depart St. Thomas, USVI where it is currently docked. *See* Petition for Order of Mandamus, §§ 6, 7, 9, 17. On August 7, 1998, the United States filed a motion to dismiss the petition, arguing that the Court lacked jurisdiction to issue an order of mandamus in such an action and that Witwater failed to exhaust its administrative remedies before filing the petition. On November 10, 1998, the Court heard argument on this motion ("hearing") and ordered that the hearing transcript be made part of the criminal action pending against Oelsner as well as part of the mandamus action Witwater initiated.

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[4] Oelsner alone brings the motion to quash and to obtain a hearing, stating that the other corporate defendants are defunct. *See* Defendants' Motion at 1, n. 1.

II. *DISCUSSION*

A. DEFENDANTS' MOTION TO QUASH AND DEMAND FOR HEARING IN CRIMINAL ACTION NO. 93-195

The writ of execution in this matter was applied for and issued pursuant to the Federal Debt Collection Procedures Act of 1990, 28 U.S.C.A. § 3001 et seq. ("Act") which provides "the exclusive civil procedures for the United States . . . to recover a judgment on a debt." *See* United States' Opposition, Attach. 4, 5; 28 U.S.C.A. § 3001(a)(1) (West 1994). The Act permits the enforcement of a judgment by writ of execution but requires that the judgment debtor be notified of the writ and given 20 days to request a hearing. *See* 28 U.S.C.A. § 3202(a),(b) (West 1994). When requesting a hearing, the judgment debtor may also request that the Court quash the writ. *See* 28 U.S.C.A. § 3202(d) (West 1994). The issues that may be addressed at the hearing are limited by the Act and include "the probable validity of any claim of exemption by the judgment debtor" and "compliance with any statutory requirement for the issuance of the postjudgment remedy." 28 U.S.C.A. § 3202(d) (West 1994).

Oelsner filed his request for a hearing and to quash the writ within 20 days after receiving notification of the writ of execution. Oelsner makes several arguments in support of his request. First, Oelsner argues that neither he nor the other defendants to Criminal Action No. 93-195 owns the Wittug upon which the United States has executed judgment. *See* Defendants' Motion, § 2. According to both Oelsner and Witwater, the actual owner of the vessel is Witwater. *See id.*, § 3; Witwater's Emergency

Motion to Intervene and to Stay or Quash Execution ("Witwater's Emergency Motion") at 2; Witwater's Reply at 1. The Act permits the United States to execute on "[a]ll property in which the judgment debtor has a substantial nonexempt interest." 28 U.S.C.A. § 3203(a) (West 1994). The Act defines "property" as "any present or future interest, whether legal or equitable, in real, personal . . . , or mixed property, tangible or intangible, vested or contingent, wherever located and however held. . . . " 28 U.S.C.A. § 3002(12) (West 1994). The United States claims that Oelsner has an equitable interest in the Wittug based on statements contained in a Price Waterhouse report that was made a part of Oelsner's sentencing hearing. *See* United States' Opposition at 4. Oelsner claims that neither he nor his co-defendants is the equitable owner of the Wittug and disputes the present validity of the Price Waterhouse report. *See* Defendants' Motion, § 4.[5] Whether Oelsner is the equitable owner of the Wittug is a question which must be resolved at a hearing on the writ.

In his motion, Oelsner also requests that the hearing provide a forum for determining the amount of restitution which is due and owing. Oelsner contends that the restitution amount in the judgment was to have been reduced to reflect his own remediation efforts. *See id.*, § 5. The Oelsner Judgment indicates that "if the costs of [the

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[5] Black's Law Dictionary defines an equitable owner as "[o]ne who is recognized in equity as owner of the property, because real and beneficial use and title belong to him, even though bare legal title is invested in another." Deluxe Black's Law Dictionary 539 (6th ed.1990).

United States'] cleanup efforts are less than the [restitution] amount to which the Court made reference of $1,440,450.00, credit will be given to the defendants to that extent." United States' Opposition, Attach. 2. The Act prohibits the use of a writ to execute judgment on property that exceeds in value the aggregate amount of the judgment. *See* 28 U.S.C.A. § 3203(c)(2)(B)(i) (West 1994). The cost of the remediation that remains to be done as well as the value of the Wittug are issues which must be resolved at a hearing on the writ.

In his motion, Oelsner also challenges the validity of the March 26, 1996 judgment itself, arguing the judgment violated Fed.R.Crim.P. 7(c)(2). *See* Defendants' Motion, § 1. This rule prohibits a judgment of forfeiture in a criminal proceeding unless the indictment or information states the extent of the interest or property that is subject to forfeiture. *See* Fed.R.Crim.P. 7(c)(2). Pursuant to 28 U.S.C.A. § 3202 (West 1994), a challenge to the validity of a judgment exceeds the scope of a hearing on a writ. Therefore, the Court cannot entertain argument regarding this challenge when it considers Oelsner's other challenges to the writ of execution.[6]

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[6] Even if the Act permitted challenges to a judgment's validity to be made at a writ hearing, the Court would not entertain Oelsner's forfeiture argument because it is completely devoid of merit. Forfeiture is a term of art used to refer to a criminal defendant's divestiture of property as a penalty for violating certain statutes. *See* Deluxe Black's Law Dictionary 650 (6th ed.1990). Criminal defendants who receive this penalty must forfeit the property used in the commission of the crime as well as property acquired from the proceeds of the crime. *See id.* Forfeiture may not be imposed unless a statute specifically provides for it. *See United States v. Charles D. Kaier Co.*, 61 F.2d

B. WITWATER'S MOTION TO INTERVENE IN CRIMINAL ACTION NO. 93-195 AND TO STAY OR QUASH THE WRIT OF EXECUTION

Even before this Court issued the writ of execution, Witwater had filed a motion requesting that it be permitted to intervene in the United States' action against Oelsner with regard to the then-anticipated writ. *See* Witwater's Emergency Motion at 1. In its motion, Witwater alleges that it is the legal owner of the Wittug and that the writ therefore violates its due process rights. *See id.*; Witwater's Reply at 1. At the November 10, 1998 hearing, the United States indicated that it had no objection to Witwater's intervention for the limited purpose of objecting to the writ of execution. *See* Hearing Transcript at 12-13. In the defendants' motion, Oelsner indicates the same. *See* Defendants' Motion at 2. The Court will therefore grant Witwater's motion to intervene for the limited purpose of challenging the writ of execution issued in Criminal Action No. 93-195.

In its motion to intervene, Witwater also requests that the Court stay or quash the writ of execution it issued on November 12, arguing that procedural defects preclude execution pursuant to the writ. First, Witwater argues that a criminal restitution judgment may not be executed upon without the Court first conducting a separate civil action to determine the amount of restitution that is due and owing. *See* Witwater's Emergency Motion

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160, 162 (3d Cir.1932). The statutory provisions under which Oelsner was convicted did not contain forfeiture penalties, nor was the Court's imposition of a fine and restitution in the nature of a forfeiture.

at 2-3. Second, Witwater argues that the United States may not collect restitution from Oelsner because the restitution order fails to identify the United States as the restitution payee. *See id.* at 3. Finally, Witwater argues that the United States failed to perfect its lien against the Wittug. *See id.* at 3-4. The Court finds that these arguments are without merit and will not permit them to be raised at the hearing on the writ in which Witwater has been given permission to participate.

The Act provides a means for the United States to enforce either civil or criminal judgments pursuant to which it is owed a debt. *See* 28 U.S.C.A. § 3002(8) (West 1994). The Act permits both civil and criminal judgments to be enforced by any of the remedies described therein, including the issuance of a writ of execution. *See* 28 U.S.C.A. § 3202(a) (West 1994). Contrary to Witwater's position, the Act does not contain any language indicating that a writ may not be issued to enforce a criminal judgment until a civil judgment has been entered in the same case. In fact, at the time Oelsner was sentenced, the United States Code explicitly permitted criminal restitution orders to be enforced in the same manner as criminal fines. *See* 18 U.S.C.A. § 3663(h) (West Supp.1996). The imposition of a fine created a lien in favor of the United States upon all property belonging to the person fined. *See* 18 U.S.C.A. § 3613(a) (West Supp.1996). The lien arose at the time the judgment was entered. *See id.* A fine, as well as an order of restitution, could "be enforced by execution against the property of the person fined in like manner as judgments in civil cases." 18 U.S.C.A. § 3613(e)

(West Supp.1996).[7] The Court therefore concludes that Witwater is mistaken in its assertion that a civil judgment must follow a criminal judgment in order for a writ of execution to issue pursuant to the Act.

While Witwater accurately points out that the Court's March 26, 1996 restitution order omits the payee's name, it incorrectly asserts that this omission prevents the United States' from executing on the judgment. Both the sentencing hearing transcript and subsequent correspondence indicate that the Court intended the payee to be the United States because the United States Coast Guard would be responsible for cleaning up the contaminated site. *See* United States' Opposition, Attach. 8 at 82-83 ("The Court finds that the cost of removal as originally submitted to the Court by the Coast Guard was $2,543,684.51."); *id.*, Attach. 9 (May 26, 1998 letter from the Coast Guard to Richard Brown & Associates, Marine Surveyor, regarding approval of plan for salvage of the Marlago, one of the vessels listed in the Court's March 26, 1996 judgment against Oelsner as subject to lien). Fed.R.Crim.P. 36 permits the Court to correct omissions like the one presently before the Court.[8] Pursuant to this

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[7] Both 18 U.S.C.A. § 3663(h) and 18 U.S.C.A. § 3613(a), (e) were amended by Pub.L. 104-132 which became effective in cases in which the defendant was convicted on or after April 24, 1996. Because the Court entered Oelsner's conviction on March 26, 1996, Oelsner was not affected by these amendments.

[8] Fed.R.Civ.P. 36 states that "[c]lerical mistakes made in judgments, orders or other parts of the record and errors in the record arising from oversight oromission may be corrected by the court at any time and after such notice, if any, as the court orders."

rule, the Court will amend the March 26, 1996 judgments against Oelsner, West Indies, and WIT Equipment to include the United States as the restitution payee. The Court will not quash the writ of execution based on its failure to include the name of the payee in its original restitution order.

Nor will the Court quash the writ based on Witwater's argument that the United States' lien against the Wittug was never perfected. Pursuant to 18 U.S.C.A. §§ 3663(h) and 3613(a), the entry of judgment against Oelsner created a lien on the Wittug. The United States perfected this lien by recording a notice of the lien on April 16, 1996 at the Recorder of Deeds, Division of St. Croix. *See* United States' Opposition, Attach. 3.

C. UNITED STATES' MOTION TO DISMISS WITWATER'S PETITION FOR ORDER OF MANDAMUS IN CIVIL ACTION NO. 98-104

Even before Witwater attempted to intervene in Criminal Action No. 93-195, it filed a petition for order of mandamus, claiming that it owned the Wittug and that the United States Customs Service wrongfully denied the Wittug clearance to depart St. Thomas, USVI where it was – and still is – docked. The United States has moved to dismiss Witwater's petition, making two arguments in support of its motion. First, the United States argues that this Court lacks jurisdiction to issue an order of mandamus in Witwater's action.[9] The United States contends

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[9] Pursuant to Fed.R.Civ.P. 12(h)(3), a court must dismiss an action "[w]henever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter."

that a district court may only issue an order of mandamus to compel a federal officer or employee to perform a mandatory, rather than a discretionary, duty. *See* Memorandum in Support of Motion to Dismiss ("United States' Dismissal Brief") at 3. According to the United States, the decision of the Port Director for the United States Customs Service to grant or deny clearance to depart a port is discretionary, not mandatory. *See id.* For this reason, the United States argues that this Court lacks jurisdiction to issue an order of mandamus compelling the Port Director to grant the Wittug clearance to leave St. Thomas. *See id.*

28 U.S.C.A. § 1361 (West 1993) states that "district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff." The Third Circuit has determined that this provision confers jurisdiction "where a clear duty is owed the plaintiff or there is an abuse of discretion." *Grant v. Hogan*, 505 F.2d 1220, 1225 (3d Cir.1974).

The law regarding the clearance of vessels bound for foreign ports is laid out at 46 U.S.C.A.App. § 91, in the federal regulations promulgated in accordance with this section, 19 C.F.R. § 4.0 et seq, and in numerous other U.S.C.A. provisions. *See, e.g.*, 8 U.S.C.A. § 1221 (West Supp.1998) (lists of alien and citizen passengers arriving and departing); 8 U.S.C.A. § 1253 (West Supp.1998) (failure of aliens to depart); 16 U.S.C.A. § 1376 (West 1985) (unlawful taking of a marine mammal); 46 U.S.C.A. § 2110 (West Supp.1998) (failure to pay customs fee); 46 U.S.C.A. § 100 (West 1958) (failure to pay legal fee). Pursuant to 46 U.S.C.A. app. § 91 (West Supp.1998), any United States or foreign vessel "shall obtain clearance

from the Customs Service before proceeding from a port or place in the United States." 19 C.F.R. § 4.61(a) (1998) describes the procedure for obtaining clearance from the Customs Service. 19 C.F.R. § 4.61(b) (1998) lists a number of requirements with regard to which a port director must verify compliance before granting clearance. As the other U.S.C.A. provisions regarding vessel clearance make clear, this list is not exhaustive.

Contrary to the United States' position, a port director's duty to grant clearances is mandatory, not discretionary. *See* 34 Op. Att'y Gen. 244 (1923).[10] A port director must comply with the statutes governing vessel clearance, granting clearances unless some statutory authority justifies his refusal to do so. *See id.*[11] Whether Murphy complied with his mandatory duty to grant clearances when he denied clearance to the Wittug is the question presented by Witwater's petition. It is a question that is within the jurisdiction of the Court to answer, pursuant to 28 U.S.C.A. § 1361.

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[10] The Attorney General predicated this holding on the 1923 language of 46 U.S.C.A.App. § 91, specifically the statement that the collector "shall grant a clearance for the vessel and cargo." *See* 34 Op. Att'y Gen. 244 (1923). While this language is not [sic] longer part of the statute, the federal regulations promulgated pursuant to the current statute contain similar language, describing the procedure for obtaining clearance and stating that "[c]learance shall be granted." 19 C.F.R. § 4.61(a).

[11] The Attorney General opinion cited for this proposition also states that a customs official may deny a clearance if the papers presented to him are not regular and legal on their face or if the vessel is burdened with a lien in favor of the United States. *See* 34 Op. Att'y Gen. 244 (1923).

The second argument the United States makes in support of its motion to dismiss Witwater's petition is that Witwater has failed to exhaust its administrative remedies. The Supreme Court has determined that mandamus relief is only available if "all other avenues of relief" have been exhausted. *Heckler v. Ringer*, 466 U.S. 602, 616, 104 S.Ct. 2013, 2022, 80 L.Ed.2d 622 (1984). The United States argues that Witwater should have protested the port director's decision to deny clearance to the United States Court of International Trade in accordance with 19 U.S.C.A. § 1514(a) (West Supp.1998). *See* United States' Dismissal Brief at 5.

As Witwater accurately asserts, however, 19 U.S.C.A. § 1514(a) does not apply to a port director's decision to deny clearance. *See Puget Sound Freight Lines v. U.S.*, 36 C.C.P.A. 70, 77-78, 173 F.2d 578, 583 (1949) (holding that the jurisdiction conferred upon the Customs Court, currently known as the Court of International Trade, and the Court of Customs and Patent Appeals, currently the Federal Circuit, by 19 U.S.C.A. § 1514(a) "is limited to fees and charges connected with the classification of merchandise and the rate of duty imposed thereon"). This Court is not aware of any administrative remedies which Witwater is required to pursue before petitioning for a writ of mandamus.

The Court find that it has jurisdiction over Witwater's petition pursuant to 28 U.S.C.A. § 1361 because the port director owes Witwater a nondiscretionary duty to grant the Wittug clearance and because Witwater was not required to exhaust any other avenues of relief before filing the current petition. The Court will therefore deny the United States' motion to dismiss.

D. CONSOLIDATION OF CRIMINAL ACTION NO. 93-195 AND CIVIL ACTION NO. 98-104

Fed.R.Civ.P. 42(a) gives the Court discretion to order a joint hearing where two separate actions involving common questions of law or fact are pending before the Court.[12] The purpose of this rule is to avoid unnecessary cost and delay. *See Mutual Life Ins. Co. v. Hillmon*, 145 U.S. 285, 292, 12 S.Ct. 909, 911, 36 L.Ed. 706 (1892); *Midwest Community Council, Inc. v. Chicago Park Dist.*, 98 F.R.D. 491, 499 (N.D.Ill.1983). The Court may order a joint hearing at the request of a party or upon its own initiative. *See Ellerman Lines, Ltd. v. Atlantic & Gulf Stevedores, Inc.*, 339 F.2d 673 (3d Cir.1964). The joint hearing does not have the effect of merging the two cases into a single case or changing the rights of the parties, "for the suits retain their separate identities and each requires the entry of a separate judgment." *Miller v. U.S. Postal Service*, 729 F.2d 1033, 1036 (5th Cir.1984); *see also McKenzie v. U.S.*, 678 F.2d 571, 574 (5th Cir.1982); *Midwest Community*, 98 F.R.D. at 499.

Because one of the issues which must be resolved in both Criminal Action No. 93-195 and Civil Action No. 98-104 is the identity of the Wittug's owner, the hearing

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[12] Fed.R.Civ.P. 42(a) states as follows:

> When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated; and it may make such orders concerning the proceedings therein as may tend to avoid unnecessary costs or delay.

on the writ will serve as a joint hearing on both matters for the purpose of determining the owner of the Wittug. Witwater, Oelsner, and the United States will participate in this hearing, ensuring the presence of all parties having an interest in these actions. The joint hearing will avoid the unnecessary cost and delay of duplicative proceedings on the issue of ownership.

III. *CONCLUSION*

For the foregoing reasons, the Court will grant Oelsner's request for a hearing on the writ of execution in Criminal Action No. 93-195, grant Witwater's motion to intervene in the hearing for the limited purpose of challenging the writ, deny the United States' motion to dismiss the petition for order of mandamus filed by Witwater in Civil Action No. 98-104, and consolidate Criminal Action No. 93-195 and Civil Action No. 98-104 to the extent that the hearing on the writ will become a joint hearing on the question of ownership of the Wittug. The Court will enter an appropriate order.

ORDER

THIS MATTER having come before the Court on the following motions: (1) a motion filed by W. James Oelsner ("Oelsner") on behalf of all of the defendants to Criminal Action No. 93-195 to quash the writ of execution filed by the United States in that action and to be granted a hearing on this matter; (2) a motion filed by Witwater Corporation ("Witwater") to intervene and to stay or quash the writ of execution filed by the United States in

Criminal Action No. 93-195; and (3) a motion to dismiss filed by the United States in Civil Action No. 98-104; and

THIS MATTER having come before the Court on its own motion to consolidate Criminal Action No. 93-195 and Civil Action No. 98-104 pursuant to Fed.R.Civ.P. 42(a) for the limited purpose of determining ownership of the Wittug; and

The Court having reviewed the record and the submissions of the parties; and

This Court having held a hearing on November 10, 1998 on the motion to dismiss in Civil Action No. 98-104, the transcript of which was made part of the record of both that action and Criminal Action No. 93-195;

For the reasons set forth in the Court's opinion of this date;

IT IS this 16th day of December, 1998 **HEREBY**

ORDERED that the Oelsner's motion for a hearing on the writ of execution is **GRANTED** for the purpose of determining the identity of the Wittug's owner, the value of the Wittug, and the cost of the remediation that remains to be done;

IT IS FURTHER ORDERED that the Court set a hearing date upon consultation with counsel;

IT IS FURTHER ORDERED that the hearing be held via video conferencing or via such other means as the Court orders;

IT IS FURTHER ORDERED that Witwater's motion to intervene in the hearing for the limited purpose of challenging the writ is **GRANTED**;

IT IS FURTHER ORDERED that the United States' motion to dismiss the petition for order of mandamus filed by Witwater in Civil Action No. 98-104 is **DENIED**;

IT IS FURTHER ORDERED that Criminal Action No. 93-195 and Civil Action No. 98-104 be **CONSOLIDATED** to the extent that the hearing on the writ will become a joint hearing on the question of ownership of the Wittug;

IT IS FURTHER ORDERED that the Court's March 26, 1996 judgments in Criminal Action No. 93-195 against Oelsner, West Indies Transport Co., Inc., and WIT Equipment Co., Inc. be **AMENDED** pursuant to Fed.R.Crim.P. 36 to name the United States as the restitution payee.

No costs.

United States Court of Appeals,
Third Circuit.

UNITED STATES of America

v.

WEST INDIES TRANSPORT, INC.,
Appellant at No. 96-7063,
WIT Equipment Co., Inc., Appellant at No. 96-7064,
W. James Oelsner, Appellant at No. 96-7065.

Nos. 96-7063, 96-7064 and 96-7065.

Argued Dec. 9, 1996.
Decided Oct. 15, 1997.

Treston E. Moore (Argued), Charlotte Amalie, St. Thomas, U.S. Virgin Islands, for Appellants.

Katherine W. Hazard (Argued), United States Department of Justice, Washington, DC, *David L. Atkinson*, Office of United States Attorney, Christiansted, St. Croix, U.S. Virgin Islands, for Appellee.

Before *SCIRICA, NYGAARD* and *McKEE*, Circuit Judges.

OPINION OF THE COURT

SCIRICA, Circuit Judge.

Defendants West Indies Transport, Inc., WIT Equipment Co., and W. James Oelsner appeal their convictions and sentences for visa fraud, environmental crimes, conspiracy, and racketeering. The district court had jurisdiction under 48 U.S.C. § 1612[1] and 18 U.S.C. §§ 3231 and

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[1] 48 U.S.C. § 1612(a) provides, in part: "The District Court of the Virgin Islands shall have the jurisdiction of a District court of the United States. . . . "

3241.[2] We have jurisdiction under 28 U.S.C. § 1291.[3] We will affirm.[4]

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48 U.S.C. § 1612(c) provides, in part: "The District Court of the Virgin Islands shall have concurrent jurisdiction with the courts of the Virgin Islands established by local law over those offenses against the criminal laws of the Virgin Islands, whether felonies or misdemeanors or both, which are of the same or similar character or part of, or based on, the same act or transaction or two or more acts or transactions connected together or constituting part of a common scheme or plan, if such act or transaction or acts or transactions also constitutes or constitute an offense or offenses against one or more of the statutes over which the District Court of the Virgin Islands has jurisdiction pursuant to subsections (a) and (b) of this section."

[2] 18 U.S.C. § 3231 provides, in part: "The district courts of the United States shall have original jurisdiction, exclusive of the courts of the States, of all offenses against the laws of the United States."

18 U.S.C. § 3241 provides: "The United States District Court for the Canal Zone and the District Court of the Virgin Islands shall have jurisdiction of offenses under the laws of the United States, not locally applicable, committed within the territorial jurisdiction of such courts, and jurisdiction, concurrently with the district courts of the United States, of offenses against the laws of the United States committed upon the high seas."

[3] 28 U.S.C. § 1291 provides, in part: "The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court."

[4] In some instances, it is difficult for us to ascertain the precise basis of the defendants' claims for relief. We have construed defendants' brief in the most plausible fashion.

I. Facts and Procedural History

West Indies Transport, Inc. and WIT Equipment Co. (collectively "West Indies Transport") operated several businesses in Krum Bay, St. Thomas, including a dry dock, ship repair facility, and barge towing company. West Indies Transport's chief operating officer was W. James Oelsner. In 1987, West Indies Transport obtained permits to use five barges as fixed docks for its other vessels. In 1989, Hurricane Hugo seriously damaged some of these barges, shifting them from their permitted positions. West Indies Transport did not attempt to repair, reposition, or salvage these barges after the storm. Instead, it used these barges as docks, repair facilities, and housing for employees in their new unauthorized locations. In the process, West Indies Transport attached the barges permanently to shore, constructed walkways and ramps between the barges for use by vehicles and employees, and wired them for electricity.

To staff its facilities, West Indies Transport hired an overseas agent to recruit Filipino workers. The Filipino workers were instructed to apply for D-1 visas intended for non-immigrant foreign maritime crewmen, not the H-2 visas required by law. The "West Indies Transport crewmen" never put to sea. Instead, West Indies Transport housed them in a converted shipping container on a barge and used them as dock workers. The Filipino workers were paid approximately $400 per month for a 56-hour work week. By using underpaid illegal foreign employees, West Indies Transport was able to reduce significantly its expenses for wages and wage taxes.

In the course of its repair operations, West Indies Transport discharged several different pollutants into the navigable waters of the United States. *Witconcrete II,* a ferro-concrete barge, was heavily damaged in Hurricane Hugo. The stern was partially severed from the remainder of the barge, attached only by metal reinforcing bars, known as rebar. West Indies Transport did not attempt to repair, break up, or salvage the damaged stern. Instead, it cut the rebar by which the stern was attached and dumped the stern into the bay. Later, when West Indies Transport decided to move the barge, it cut additional protruding pieces of rebar from the structure and dumped them in the water. West Indies Transport also sand-blasted the hull of a vessel moored in its facility, causing paint chips and sand to fall into Krum Bay near the main water intake for the St. Thomas desalinization plant. The toilet system on the *Witrollon,* the barge on which illegal Filipino workers were housed, discharged raw sewage directly into the bay. West Indies Transport also collected steel scrap from its repair operations and dumped it twelve miles out at sea under cover of darkness. West Indies Transport never obtained a permit for any of these pollution discharges.

Defendants were charged in a twenty-one count indictment for visa fraud, environmental crimes, conspiracy, and racketeering. Five counts were dismissed on motion of the government. A jury found defendants guilty on the remaining sixteen counts. Defendants moved for post-verdict judgment of acquittal, which the district court denied. This appeal followed.

II. Visa Fraud

A.

Defendants were convicted of aiding and abetting visa fraud in violation of 18 U.S.C. § 2 and 18 U.S.C. § 1546.[5] At trial, the district court instructed the jury that defendants' representations to U.S. immigration and State Department officials verifying that Filipino workers hired by West Indies Transport would be working as crewmen aboard foreign flagged vessels were material as a matter of law. These instructions were consistent with our decision in *United States v. Greber*, 760 F.2d 68 (3d Cir.), *cert. denied*, 474 U.S. 988, 106 S.Ct. 396, 88 L.Ed.2d 348 (1985), which held that when a defendant is tried for perjury the issue of materiality is decided by the court.

Between verdict and sentencing, the United States Supreme Court held that on a perjury charge under 18 U.S.C. § 1001, materiality must be submitted to the jury. *United States v. Gaudin*, 515 U.S. 506, 115 S.Ct. 2310, 132

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[5] 18 U.S.C. § 1546 provides, in part: "Whoever knowingly makes under oath, or . . . knowingly subscribes as true, any false statement with respect to a material fact in any application, affidavit, or other document required by the immigration laws or regulations prescribed thereunder, or knowingly presents any such application, affidavit, or other document containing such statement – Shall be fined under this title or imprisoned not more than five years, or both." 18 U.S.C. § 2 provides: "(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal. (b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal."

L.Ed.2d 444 (1995). "The Constitution gives a criminal defendant the right to have a jury determine, beyond a reasonable doubt, his guilt of every element of the crime with which he is charged. The trial court's refusal to allow the jury to pass on the materiality of Gaudin's false statements infringed that right." *Id.* at 522-23, 115 S.Ct. at 2320.

The rule announced in *Gaudin* applies retroactively to this direct appeal. *Johnson v. United States*, 520 U.S. 461, ___, 117 S.Ct. 1544, 1549, 137 L.Ed.2d 718 (1997) (*Gaudin* applies retroactively on direct review; citing *Griffith v. Kentucky*, 479 U.S. 314, 328, 107 S.Ct. 708, 716, 93 L.Ed.2d 649 (1987)). Defendants contend that *Gaudin* requires a new trial.

Defendants submitted to the district court proposed jury instructions which took the issue of materiality away from the jury, but now object to those same instructions. For this reason, the government asks us to treat the district court's instructions as non-reviewable invited error, under *United States v. Console*, 13 F.3d 641 (3d Cir.1993), *cert. denied*, 513 U.S. 812, 115 S.Ct. 64, 130 L.Ed.2d 21 (1994) and *Herman v. Hess Oil Virgin Islands Corp.*, 524 F.2d 767 (3d Cir.1975). We decline to do so. Where a defendant submits proposed jury instructions in reliance on current law, and on direct appeal that law is declared constitutionally infirm, we will not apply the invited error doctrine. Instead, we will review for plain error under Fed.R.Crim.P. 52. *See Johnson*, at ___ – ___, 117 S.Ct. at 1548-49 (reviewing *Gaudin* error under plain error standard where defendant, relying on current law later declared unconstitutional, insisted at trial that materiality was an issue for the court, not jury, to decide). Under Rule 52, "before an appellate court can correct an error

not raised at trial, there must be (1) error, (2) that is plain, and (3) that affects substantial rights. If all three conditions are met, an appellate court may then exercise its discretion to notice a forfeited error, but only if (4) the error seriously affects the fairness, integrity or public reputation of the judicial proceedings." *Johnson*, at ___ – ___, 117 S.Ct. at 1549 (internal quotations and brackets omitted; citing *United States v. Olano*, 507 U.S. 725, 732, 113 S.Ct. 1770, 1776-77, 123 L.Ed.2d 508 (1993)). As the Supreme Court explained in *Johnson*, "in a case such as this – where the law at the time of trial was settled and clearly contrary to the law at the time of appeal – it is enough that an error be 'plain' at the time of appellate consideration." *Id. See also United States v. Retos*, 25 F.3d 1220 (3d Cir.1994) (question is not whether error was plain at time of trial, but whether it is plain based on current law at time of direct appeal).

Failure to submit the issue of materiality to the jury was error. *Gaudin*, at 522, 115 S.Ct. at 2320; *Johnson*, at ___, 117 S.Ct. at 1549. That *Gaudin* involved perjury under 18 U.S.C. § 1001 rather than 18 U.S.C. § 1546, the relevant statute here, is not significant given the identical character of the materiality element in both perjury statutes. *See Johnson v. U.S.*, 520 U.S. 461, 117 S.Ct. 1544, 137 L.Ed.2d 718 (1997) (applying *Gaudin* to case involving perjury under 18 U.S.C. § 1623); *United States v. DiRico*, 78 F.3d 732 (1st Cir.1996) (applying *Gaudin* to perjury under 26 U.S.C. § 7206(1)).

A "plain" error is an error which is "clear" or "obvious." *Johnson*, at ___, 117 S.Ct. at 1549; *Olano*, 507 U.S. at 734, 113 S.Ct. at 1777-78. Failure to send the issue of materiality to the jury is, in light of *Gaudin*, obvious or

clear and therefore "plain" error. *Johnson*, at ___, 117 S.Ct. at 1549.

To satisfy the "substantial rights" prong of the plain error test, defendants usually must show that the error was "prejudicial" – "It must have affected the outcome of the district court proceedings." *Olano*, 507 U.S. at 734, 113 S.Ct. at 1777-78; *United States v. Turcks*, 41 F.3d 893 (3d Cir.1994) (same), *cert. denied*, 514 U.S. 1074, 115 S.Ct. 1716, 131 L.Ed.2d 575 (1995).[6] Defendants bear this burden of proof. *Id.* Defendants here have not brought to our attention any facts suggesting that a jury might have reached a conclusion different from the district court on materiality. Defendants presented no evidence at trial that their statements were not material. More importantly, the government introduced substantial evidence proving the defendants' representations were material. Indeed, had immigration officials known the true facts behind the Filipino workers' applications for visas – defendants'

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[6] In *Olano*, the Supreme Court suggested that there might be a "special category" of structural errors that can be corrected under Rule 52 regardless of their effect on the outcome of the trial, 507 U.S. at 735, 113 S.Ct. at 1778, but did not state what types of cases might fall under this special category. In *Johnson v. U.S.*, 520 U.S. 461, 117 S.Ct. 1544, 137 L.Ed.2d 718 (1997), the Supreme Court declined to address whether a *Gaudin* error falls within this category. Our ruling in *U.S. v. Retos*, 25 F.3d 1220, assumed but did not decide that this "special category," whatever its content, does not include cases where the district court failed to instruct the jury on an essential element of the offense. We agree with that assumption. But *see United States v. David*, 83 F.3d 638 (4th Cir.1996) (failure to send issue of materiality to jury falls within "special category" noted by Supreme Court in *Olano*; reversal required regardless of effect on outcome).

intention to employ as dock workers illegally underpaid foreign workers housed permanently on derelict barges – the visas never would have been granted. For these reasons, defendants have not met their burden of proving that the failure to submit the issue of materiality to the jury affected the outcome of the trial. *See United States v. Kramer,* 73 F.3d 1067 (11th Cir.) (*Gaudin* error not reversible plain error; defendant failed to show that error affected outcome of trial), *cert. denied,* 519 U.S. 1011, 117 S.Ct. 516, 136 L.Ed.2d 405 (1996); *United States v. Ross,* 77 F.3d 1525 (7th Cir.1996) (*Gaudin* error not reversible plain error; issue of materiality not seriously disputed at trial).

"When the first three parts of Olano are satisfied, an appellate court must then determine whether the forfeited error seriously affects the fairness, integrity, or public reputation of judicial proceedings before it may exercise its discretion to correct the error." *Johnson,* at ___, 117 S.Ct. at 1550 (internal quotations and brackets omitted). Whether or not their substantial rights were affected, defendants have not satisfied the fourth prong of the *Olano* test. In *Johnson,* a case involving similar facts, the Supreme Court observed that the evidence of materiality was "overwhelming," materiality was "essentially uncontroverted at trial," and the defendant had presented "no plausible argument" that her false statements were "somehow not material." *Id.* The Supreme Court concluded: "On this record there is no basis for concluding that the error seriously affected the fairness, integrity or public reputation of the judicial proceedings. Indeed, it would be the reversal of a conviction such as this which would have that effect. . . . No miscarriage of justice will

result here if we do not notice the error, and we decline to do so." *Id.* (internal quotations omitted).

In the same manner, the evidence at trial that West Indies Transport's representations were material was overwhelming and uncontroverted. On appeal, defendants have not presented a plausible argument that their statements were not material. The failure to submit materiality to the jury did not seriously affect the fairness, integrity, or public reputation of the judicial proceedings. For these reasons, we will affirm the convictions on visa fraud.

B.

Defendants contend their convictions for aiding and abetting visa fraud must be reversed because the district court did not instruct the jury that it must find "knowing subscription" or "knowing presentation" of false material. Not only did defendants fail to request such an instruction, their proposed instruction was remarkably similar to that actually delivered by the district court.[7] "Thus, if there was any error at all, it was 'invited error' and cannot now be a basis for reversal." *United States v. Console*, 13 F.3d 641, 661 (3d Cir.1993) (quoting *Herman v. Hess Oil Virgin Islands Corp.*, 524 F.2d 767, 772 (3d Cir.1975)), *cert. denied*, 513 U.S. 812, 115 S.Ct. 64, 130 L.Ed.2d 21 (1994).

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[7] Compare defendants' proposed instruction, requiring the jury to find that "knowing false statement be made" to the government, SA 1140, with actual instruction used, which required the jury to find that false statements were "made" and that the defendants "knew" that they were false, A 981.

C.

Defendants contend as a matter of law they could not be convicted of aiding and abetting visa fraud because the government conceded that immigrant workers who presented false information to the INS at West Indies Transport's instigation lacked criminal intent. We review *de novo* where the question is one of statutory interpretation. *United States v. Schneider*, 14 F.3d 876 (3d Cir.1994).

The aiding and abetting statute provides, *inter alia*, that a defendant is liable if he willfully causes an act to be done by another which would be illegal if he did it himself. 18 U.S.C. § 2(b). For this reason, whether the immigrant workers lacked criminal intent is irrelevant so long as West Indies Transport intentionally caused them to submit false information. As the Court of Appeals for the Eleventh Circuit explained, "it is well established that § 2(b) was designed to impose criminal liability on one who causes an intermediary to commit a criminal act, even though the intermediary who performed the act has no criminal intent and hence is innocent of the substantive crime charged." *United States v. Tobon-Builes*, 706 F.2d 1092, 1099 (11th Cir.), *reh'g denied*, 716 F.2d 914 (1983). *See also Springs v. First Nat. Bank of Cut Bank*, 835 F.2d 1293 (9th Cir.1988) ("A person who causes the commission of an offense is punishable as a principal even though the person who commits the wrongful act violates no criminal statute because of lack of criminal intent or capacity.").

In *United States v. Catena*, 500 F.2d 1319 (3d Cir.), *cert. denied*, 419 U.S. 1047, 95 S.Ct. 621, 42 L.Ed.2d 641 (1974), a physician was convicted for presenting false Medicare

claims to the United States. On appeal, the physician argued that his conviction must be overturned because he did not present the claims to the United States in person. Rather, he submitted the false claims to two insurance companies, which forwarded them to the United States government. We affirmed his conviction, observing that under "§ 2(b) a person may be convicted of causing a false claim to be presented to the United States even though he uses an innocent intermediary (in this case the insurance carriers) to actually pass on the claims to the United States." *Id.* at 1323.

The Court of Appeals for the Ninth Circuit reached the same conclusion in *United States v. Causey,* 835 F.2d 1289 (9th Cir.1987). In *Causey,* a tax protester was convicted for aiding and abetting tax evasion by helping persons file false tax returns. On appeal, he argued the government failed to prove that the persons actually submitting the false returns possessed criminal intent. The court rejected this argument "because it is immaterial to Causey's conviction whether or not the taxpayers were shown to have intended to file false tax returns." *Id.* at 1291. "Under section 2(b) . . . the government need not prove that someone other than the defendant was guilty of the substantive crime. A person who causes the commission of an offense is punishable as a principal even though the person who completes the wrongful act violates no criminal statute because of lack of intent or capacity. . . . Whether the taxpayers had guilty knowledge in submitting the claims becomes irrelevant under section 2(b)." *Id.* at 1291.

West Indies Transport's arguments are indistinguishable from those rejected in *Catena* and *Causey.* When a

defendant uses an innocent intermediary to present false claims or make false statements to the government, the criminal intent of the intermediary is not an element of the offense. 18 U.S.C. § 2(b). For this reason, the district court's charge was not erroneous.

III. Environmental Crimes

A.

Defendants were convicted of violating the Clean Water Act, 33 U.S.C. § 1251 et seq., by (1) severing a 250-ton concrete and rebar block from the stern of *Witconcrete II*, a ferrous concrete barge, and dumping it into Krum Bay, St. Thomas; (2) severing approximately one hundred pieces of rebar and attached concrete from the stern of *Witconcrete II* and dropping it into Krause Lagoon; and (3) conducting sandblasting operations on a floating barge that projected sand and paint chip residue into Krum Bay. The Clean Water Act generally prohibits discharging pollutants into the navigable waters of the United States without a permit. But it only regulates "discharges" of pollutants from a "point source." *See* 33 U.S.C. §§ 1311(a) and 1362(12).[8] Defendants contend as a matter of law their conduct did not constitute discharge of a pollutant

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[8] 33 U.S.C. § 1311(a) provides: "Except as in compliance with this section and sections 1312, 1316, 1317, 1328, 1342, and 1344 of this title, the discharge of any pollutant by any person shall be unlawful." 33 U.S.C. § 1362(12) provides: "The term 'discharge of a pollutant' and the term 'discharge of pollutants' means (A) any addition of any pollutant to navigable waters from any point source, (B) any addition of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft."

from a point source. We review questions of statutory interpretation de novo. *United States v. Schneider,* 14 F.3d 876 (3d Cir.1994).

Barges are "floating craft," expressly included within the definition of "point source." 33 U.S.C. 1362(14).[9] "Discharges" include "any addition of any pollutant to navigable waters from any point source." Defendants concede that Krum Bay and Krause Lagoon are navigable waters of the United States. Rebar, concrete, sand and paint chips fall within the Clean Water Act's broad definition of "pollutant." 33 U.S.C. § 1362(6).[10] Therefore, cutting off pieces of a ferro-concrete barge and dumping them in Krum Bay and Krause Lagoon, or conducting sandblasting on a floating craft and allowing the residue to fall into Krum Bay, constitutes making an addition of a pollutant to navigable waters of the United States from a point source. Defendants' conduct fell within the applicable statutory definitions.

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[9] 33 U.S.C. § 1362(14) provides: "The term 'point source' means any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. The term does not include agricultural stormwater discharges and return flows from irrigated agriculture."

[10] 33 U.S.C. § 1362(6) provides, in part: "The term 'pollutant' means dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water."

Appellants' reliance on *United States v. Plaza Health Labs., Inc.*, 3 F.3d 643 (2d Cir.1993), *cert. denied*, 512 U.S. 1245, 114 S.Ct. 2764, 129 L.Ed.2d 878 (1994), does not alter our conclusion. There, defendant removed containers loaded with blood vials from his office, transported them in his car, and carried them to the Hudson River, where he deposited them during low tide in a bulkhead separating his home from the river. The United States Court of Appeals for the Second Circuit refused to consider defendant a "point source." But Plaza offers no guidance here because it focused almost exclusively on the application of the Clean Water Act to human beings:

> As the parties have presented the issue to us in their briefs and at oral argument, the question is 'whether a human being can be a point source.'
>
> * * *
>
> Human beings are not among the enumerated items that may be a 'point source'. . . . if every discharge involving humans were to be considered a 'discharge from a point source.' the statute's lengthy definition of 'point source' would have been unnecessary.
>
> * * *
>
> The Clean Water Act generally targets industrial and municipal sources of pollutants, as is evident from a perusal of its many sections. . . . The legislative history of the CWA . . . confirms the act's focus on industrial polluters.
>
> * * *
>
> We find no suggestion either in the act itself or in the history of its passage that congress intended the CWA to impose criminal liability

> on an individual for the myriad, random acts of human waste disposal, for example, a passerby who flings a candy wrapper into the Hudson River, or a urinating swimmer. Discussions during the passage of the 1972 amendments indicate that congress had bigger fish to fry.

Id. at 647 (citations omitted). Congress intended a broad definition of "point source:" "[t]he concept of a point source was designed to further this [regulatory] scheme by embracing the broadest possible definition of any identifiable conveyance from which pollutants might enter the waters of the United States." *United States v. Earth Sciences, Inc.*, 599 F.2d 368, 373 (10th Cir.1979). *Plaza* properly circumscribed the breadth of the "point source" definition that the rebar was actually part of the *Witconcrete II* and does not alter the analysis. Before and after the severance of the rebar, the *Witconcrete II* qualified as a "vessel or other floating craft" within the parameters of 33 U.S.C. § 1362(14). The deliberate amputation of a portion of the vessel did not destroy the *Witconcrete II*'s suitablity as a "point source." *Cf. Hudson Riverkeeper Fund, Inc. v. Harbor at Hastings Assocs.*, 917 F.Supp. 251, 257 (S.D.N.Y.1996) ("[i]t would seem unlikely that Building 15 would fit into this interpretation of point source as any discharge of material would not be deliberate or systematic"). We see no error here.

B.

Defendants were also convicted for discharging untreated sewage into Krum Bay from a barge used to house their workers, in violation of 33 U.S.C. §§ 1311(a)

and 1319(c)(2)(A).[11] Defendants correctly argue and the government concedes that "sewage from vessels" is regulated under 33 U.S.C. § 1322, not §§ 1311 and 1319. Thus, if defendants' barge falls within the statutory definition of "vessel," the conduct in question does not violate § 1311(a) and § 1319(c)(2)(A) and their convictions must be reversed. Defendants maintain their barge on which they housed Filipino workers is a vessel. We disagree.

33 U.S.C. § 1322(a)(1) defines "new vessel" and "existing vessel" to include "every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water." This definition contrasts vessels with "other floating craft," a term which the Clean Water Act does not define, but which suggests by its terms and in the context of the statute an artificial water-borne contrivance that, in contrast to a vessel, is not used or capable of being used for transportation purposes. *See* 33 U.S.C. § 1362(12). At all relevant times, the barge in question was moored permanently to shore. It was used to house foreign workers, not as a means of transport. Nor could the barge have been used for transport. According to testimony at trial, defendants' barge was half submerged in the water of Krum Bay, with part of the hull resting on the bottom and with water visible below decks. The barge could not be moved from

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[11] 33 U.S.C. § 1311(a) provides:

"Except as in compliance with this section and sections 1312, 1316, 1317, 1328, 1342 and 1344 of this title, the discharge of any pollutant by any person shall be unlawful." Section 1319(c)(2)(A) provides for criminal sanctions for "any person" who "knowingly" violates § 1311.

its mooring. There was sufficient evidence therefore for the trier of fact to conclude that the barge was not a vessel within the meaning of the Clean Water Act.

Though we are not aware of any authority interpreting the meaning of "vessel" under § 1322, our view is in accord with long-standing interpretation of the term "vessel" in other contexts. *See Cope v. Vallette Dry-Dock Co.*, 119 U.S. 625, 7 S.Ct. 336, 30 L.Ed. 501 (1887) (dry dock attached to shore by large chains, with no means of propulsion, and incapable of being used for navigation, not a vessel; "The fact that it floats on the water does not make it a ship or vessel."); *Kathriner v. UNISEA, Inc.*, 975 F.2d 657 (9th Cir.1992) ("[F]loating structures are not classified as vessels in navigation if they are incapable of independent movement over water, are permanently moored to land, have no transportation function of any kind, and have no ability to navigate.").

C.

33 U.S.C. § 1319(c)(2)(A) establishes criminal penalties for anyone who "knowingly" violates 33 U.S.C. § 1311. Defendants contend the district court erred when it failed to instruct jurors on the definition of "knowingly," arguing that jurors might have been unaware that an accidental discharge of pollutants was insufficient to convict. Defendants did not raise this objection at trial, so we review for plain error.

Despite defendants' contention, the court instructed jurors on the meaning of the term "knowingly." It stated: "An act is done knowingly if done voluntarily and intentionally, and not because of mistake or accident or other

innocent reason. The purpose of adding the word 'knowingly' is to insure that no one will be convicted for an act done because of mistake, accident, or other innocent reason." There was no error here.

D.

Defendants were convicted for violating the Rivers and Harbors Act, 33 U.S.C. § 403, which provides, in part:

> it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures in . . . any water of the United States, outside established harbor lines, or where no harbor lines have been established, except on plans recommended by the Chief of Engineers and authorized by the Secretary of the Army.

Defendants contend the district court should have dismissed this count because the government "did not prove that the Defendants had knowingly built a pier, wharf, or any other structure."

Under longstanding precedent, the prohibition on "build[ing] or commencing the building of any wharf, pier . . . or other structures" contained in § 403 contemplates "the purposeful creation of something formulated or designed, construction work in the conventional sense." *United States v. Bigan*, 274 F.2d 729, 732 (3d Cir.1960). Thus, we have held that negligent creation of an obstruction to navigation does not violate § 403. *See id.* (negligently caused land slide resulting in blocked river channel not a violation of § 403).

At trial, the government presented evidence that defendants intentionally strung together numerous derelict barges to form a permanent dock for loading activities, repairs, and the housing of employees. West Indies Transport permanently attached these barges together and to land with rope and wire cable. The barges and shore were connected by walkways defendants constructed out of metal and wood. The resulting wharfs were wired for electricity and were substantial enough to support significant loading and repair operations, including the use of forklifts. This evidence provided sufficient basis that defendants purposefully built an unauthorized structure. This was not a case where an act of nature or negligence resulted in an obstruction to navigation. It was clear that defendants here intentionally built a large dock to conduct their business activities.[12]

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[12] Consistent with the United States Supreme Court's directive to interpret 33 U.S.C. § 403 broadly, courts have considered structures analogous to the barges at issue in the instant case "obstructions." *See United States v. Republic Steel Corp.*, 362 U.S. 482, 487, 80 S.Ct. 884, 887-88, 4 L.Ed.2d 903 (1960) ("the Court . . . gave the concept 'obstruction' . . . a broad sweep"), *reh'g denied*, 363 U.S. 858, 80 S.Ct. 1605, 4 L.Ed.2d 1739 (1960); *Norfolk & Western Co. v. United States*, 641 F.2d 1201, 1210 (6th Cir.1980) (" 'obstruction' within the meaning . . . of the Act is to be liberally construed"). Examples of like structures which constitute "obstructions" include docks, piers, boat ramps, and sunken vessels. *See Great Am. Ins. Co. v. Tugs "Cissi Reinauer"*, 933 F.Supp. 1205, 1219 (S.D.N.Y.1996) (finding a houseboat, that served as a residence and was not moved for more than seven months, constituted a "permanently moored vessel" and an "unauthorized riparian 'obstruction' " for purposes of § 403) (citations omitted); *United States v. Lambert*, 915 F.Supp. 797, 804 (S.D.W.Va.1996) ("[t]he dock and its extension are 'structures' that obstruct the navigable capacity of the River. The River's

E.

Defendants raise a second objection to their convictions under 33 U.S.C. § 403, the Rivers and Harbors Act. 33 U.S.C. § 403 sanctions the construction of structures in water of the United States only when those structures are built "outside established harbor lines, or where no harbor lines have been established." 33 U.S.C. § 403. The district court did not instruct the jury that it must find defendants built a structure outside harbor lines, or where no lines have been established. Although defendants now contend on appeal the jury instruction was fatally deficient, their proposed jury instruction made no mention of the "harbor lines" element. "Thus, if there was any error at all, it was 'invited error' and cannot now be a basis for reversal." *United States v. Console*, 13 F.3d 641, 661 (3d Cir.1993) (quoting *Herman v. Hess Oil Virgin Islands Corp.*, 524 F.2d 767, 772 (3d Cir.1975)).

If not invited error, we would review for plain error because defendants did not object at trial. A plain error must be "prejudicial" – "It must have affected the outcome of the district court proceedings." *Olano*, 507 U.S. at 734, 113 S.Ct. at 1778; *United States v. Turcks*, 41 F.3d 893

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normal flow and circulation patterns have been disrupted also"); *Fox Bay Partners v. United States Corps of Engineers*, 831 F.Supp. 605, 608 (N.D.Ill.1993) ("the construction of docks, piers, and boat ramps creates obstructions in the navigable waters of the United States"); *United States v. Ohio Barge Lines, Inc.*, 432 F.Supp. 1023, 1027 (E.D.Pa.1977) ("[a] barge, whether negligently or intentionally sunk in a navigable river of the United States, to further the purpose of the Act and not narrow it . . . [is included] as an obstruction").

(3d Cir.1994) (same). Defendants bear this burden of proof. *Id.*

Defendants have not brought to our attention any evidence suggesting that the district court's instruction affected the outcome of the trial. West Indies Transport has not argued, at trial or on appeal, that its docks were in fact constructed within established harbor lines, or where no lines have been established. On the contrary, defendants appear to concede this issue. Nor do defendants contend that a reasonable jury might have acquitted them on this charge had it been instructed on the harbor lines requirement. We see no indication that the district court's jury instruction had any impact on the outcome of the trial. For these reasons and because the district court followed the defendants' proposed instruction, the court's instruction did not seriously affect the fairness, integrity, or public reputation of the judicial proceedings. Therefore we see no plain error.

IV. Alleged Prejudicial Testimony

Randolph Allen, a local labor official, testified for the government regarding the costs defendants would have incurred had they employed workers through legal means. Defendants objected to his testimony on the ground that it was unduly prejudicial and irrelevant. The district court allowed Allen's testimony as probative of defendants' motive and intent to commit visa fraud.

After the conclusion of Allen's testimony defendants asked for a mistrial, citing possible prejudice among union workers on the jury against someone who

employed alien labor. Defendants also asked the court to question the jury for possible prejudice. Denying the motion for mistrial, the court noted that defendants failed to raise this question with potential jurors during pretrial voir dire. Nevertheless, the district court halted the trial and asked the jurors whether any of them had "such strong feelings for or against alien workers" that they would not be able "to decide this case fairly and impartially." No juror responded affirmatively.

We review denial of mistrial for abuse of discretion. *United States v. Wright-Barker*, 784 F.2d 161, 175 (3d Cir.1986). Allen's testimony was relevant to and probative on the intent element of the charged visa fraud counts because it tended to establish the defendants' motive. We see no sign of undue prejudice. Though the defendants did not raise this issue during voir dire, the district court carefully questioned the jury to ensure there was no prejudice that might affect the jury's impartiality. We see no abuse of discretion here.

V. Entrapment by Estoppel

Defendants contend they were denied a fair trial when the district court prevented them from presenting evidence relevant to, and failed to instruct the jury on, two "entrapment by estoppel" defenses.

A.

The affirmative defense of entrapment by estoppel has its roots in two Supreme Court decisions, *Raley v. State of Ohio*, 360 U.S. 423, 79 S.Ct. 1257, 3 L.Ed.2d 1344

(1959) and *Cox v. State of Louisiana*, 379 U.S. 559, 85 S.Ct. 476, 13 L.Ed.2d 487 (1965), *reh'g denied*, 380 U.S. 926, 85 S.Ct. 879, 13 L.Ed.2d 814 (1965), finding violations of due process. In *Raley*, defendants refused to answer questions of the Ohio Un-American Activities Commission after a state official erroneously informed them that they were protected under the state constitution's privilege against self-incrimination. The defendants were subsequently held in contempt. The Supreme Court reversed, holding that the state may not "convict[ ] a citizen for exercising a privilege which the state clearly had told him was available to him," for to do so "would be to sanction the most indefensible sort of entrapment." *Id.* at 438, 79 S.Ct. at 1266. The Court applied the doctrine again in *Cox*, where it reversed state law convictions for picketing because a state official had granted defendants permission to picket.

We have applied the entrapment by estoppel defense in only one prior decision, *United States v. Pennsylvania Industrial Chemical Corp.*, 461 F.2d 468 (3d Cir.1972), modified and remanded, 411 U.S. 655, 93 S.Ct. 1804, 36 L.Ed.2d 567 (1973). In *Pennsylvania Industrial*, the defendant was charged with discharging pollution into the Monongahela River, in violation of the Rivers and Harbors Act, 33 U.S.C. § 407. At trial, the defendant sought to present evidence that its allegedly criminal acts had been authorized by Army regulations and the federal government's long-term interpretation of the statute. The district court prohibited the defendant from introducing the evidence and refused to instruct a jury that the defendant should be acquitted if his actions resulted from affirmative government representations that its acts were lawful.

Citing due process grounds, we reversed on appeal. "The concept of fair play is implicit in our basic notions of what is meant by due process of law. In this regard, an individual or corporation should not be held criminally responsible for activities which could not reasonably have been anticipated to be illegal based on 70 years of consistent government interpretation and subsequent behavior." *Id.* at 479. Because the defendant had not been allowed to present the evidence nor had the jury been instructed on the entrapment by estoppel defense, we granted a new trial. *Id.*

The Supreme Court agreed with our statement of the law, holding "it was error for the District Court to refuse to permit PICCO to present evidence in support of its claim that it had been affirmatively misled into believing that the discharges in question were not a violation of the statute." *United States v. Pennsylvania Indus. Chem. Corp.*, 411 U.S. 655, 675, 93 S.Ct. 1804, 1817, 36 L.Ed.2d 567 (1973). The Court also held that the defense applied only where there is reliance in fact and that reliance was reasonable under the circumstances. *Id.*

Since *Pennsylvania Chemical* was decided, other courts of appeals, citing the due process clause, have applied the entrapment by estoppel defense, although employing slightly different tests. *See*, e.g., *United States v. Rector*, 111 F.3d 503, 506-07 (7th Cir.1997) (entrapment by estoppel defense applies where "the one misleading the defendant be an official of the state; that he actively mislead the defendant; and that the defendant's reliance be actual and reasonable in light of the identity of the agent, the point of law represented, and the substance of the misrepresentation"; additionally, defendant's reliance must

be in good faith); *United States v. Aquino-Chacon*, 109 F.3d 936, 938 (4th Cir.1997) ("A criminal defendant may assert an entrapment-by-estoppel defense when the government affirmatively assures him that certain conduct is lawful, the defendant thereafter engages in the conduct in reasonable reliance on those assurances, and a criminal prosecution based upon the conduct ensues."); *United States v. Trevino-Martinez*, 86 F.3d 65, 69 (5th Cir.1996) ("criminal defendant may be entitled to raise a defense of entrapment by estoppel only when a government official or agent actively assures a defendant that certain conduct is legal and the defendant reasonably relies on that advice and continues or initiates the conduct") (internal quotations omitted), *cert. denied*, 520 U.S. 1105, 117 S.Ct. 1109, 137 L.Ed.2d 310 (1997); *United States v. Brebner*, 951 F.2d 1017, 1024 (9th Cir.1991) ("The entrapment by estoppel defense applies when an authorized government official tells the defendant that certain conduct is legal and the defendant believes the official."); *United States v. Smith*, 940 F.2d 710, 714 (1st Cir.1991) ("Entrapment by estoppel has been held to apply when an official assures a defendant that certain conduct is legal, and the defendant reasonably relies on that advice and continues or initiates the conduct."). These courts agree that reasonable reliance means a defendant must establish that "a person truly desirous of obeying the law would have accepted the information as true, and would not have been put on notice to make further inquiries." *Trevino-Martinez*, 86 F.3d at 69; *Brebner*, 951 F.2d at 1024.

We hold the entrapment by estoppel defense applies where the defendant establishes by a preponderance of the evidence that (1) a government official (2) told the

defendant that certain criminal conduct was legal, (3) the defendant actually relied on the government official's statements, (4) and the defendant's reliance was in good faith and reasonable in light of the identity of the government official, the point of law represented, and the substance of the official's statement.[13]

B.

At trial, defendants sought to raise two entrapment by estoppel defenses. First, they wished to present testimony from certain West Indies Transport employees and INS agents. Defendants claimed the testimony would show that they had fully informed INS that they wanted to employ foreign nationals admitted to the United States on D-1 crewman visas as dockworkers at their facility, and that INS had approved of the scheme.

The district court held that "[t]o establish entitlement to the defense of entrapment by estoppel . . . defendants must show (1) that after fully informing government officials with actual or apparent authority of the underlying facts, they were advised that the alleged conduct was legal; (2) that they relied on that advice; and (3) that reliance was reasonable, and given that reliance, prosecution would be unfair." After holding an in camera hearing to review the proffered evidence, the district court concluded defendants' evidence demonstrated only that INS

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[13] The defendant's reliance is reasonable and in good faith only where a person truly desirous of obeying the law would have accepted the information as true, and would not have been put on notice to make further inquiries.

extended the Filipino workers' visas based on representations by West Indies Transport that the workers would soon be employed as crewmen on ocean-going vessels. The evidence also showed that defendants never informed any United States officials at any time that the workers would be living on United States soil and that they would work as dock workers on derelict barges and on land. For these reasons, the district court held that defendants had offered no evidence tending to prove that the INS was informed of and approved defendants' scheme to employ alien workers admitted to the United States on D-1 foreign crewman visas as permanent dockhands.[14]

As the district court correctly observed, defendants pointed to no evidence tending to prove that the INS was informed of and approved defendants' scheme to employ alien workers admitted to the United States on D-1 foreign crewman visas as permanent dockhands. Defendants have failed to establish a necessary element of the defense – that government officials told them that their conduct was lawful. For that reason, the district court correctly excluded the proffered evidence.

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[14] The district court said: "The proffered testimony has led me to conclude that no comments by a government agency can be construed as indicating to defendants that their conduct was legal, when no government official was ever informed as to the specifics of the given situation. Because defendants failed to inform any government authority of the facts which are relevant to obtaining the visas, they could not have obtained or relied upon any advice indicating that their conduct with regard to the information provided on the visa applications was legal. Thus the entrapment by estoppel defense is not available to the defendants in this case."

C.

The second entrapment by estoppel claim arises out of defendants' convictions under the Ocean Dumping Act, 33 U.S.C. §§ 1411(a) and 1415(b)(1). Defendants were convicted for dumping large quantities of scrap metal and other debris into the ocean under cover of darkness, without a permit. Coast Guard regulations implementing the Act to Prevent Pollution from Ships, 33 U.S.C. § 1901-11, require all vessels 26 feet and longer to carry placards that warn vessel owners and crews that certain discharges of ship-generated garbage and sewage are prohibited at various distances from shore. At trial, defendants argued that the placards led them to believe that they could legally dump scrap metal into the ocean so long as the dump site was at least twelve miles off-shore. The district court allowed them to present their evidence, but did not instruct the jury on the entrapment by estoppel defense.[15]

Defendants contend their reasonable reliance on these signs absolved them of criminal responsibility under the doctrine of entrapment by estoppel. In the alternative, they contend the failure to instruct on the entrapment by estoppel defense violated their due process rights.

Defendants have included in the appellate record examples of placards similar to those on which they claimed they relied when they believed their dumping

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[15] We cannot ascertain from the defendants' brief or appendix whether the defendants requested such an instruction.

operations were legal. One example, apparently produced by the Coast Guard, states that certain types of "nonplastic trash" may be discharged at sea if the vessel is at least twelve nautical miles from shore. The placard makes no representations about scrap metal. It also states, in clear type: "The information contained on this device is provided as a guidance to many, but not all, of the discharge restrictions which apply under United States law. There are a number of discharge restrictions which are not set out in this device."

Defendants were not entitled to an entrapment by estoppel instruction on the strength of this placard. The placard makes no representations about the legality of defendants' conduct – dumping scrap metal off-shore. The placard expressly states that other discharge restrictions may apply, putting defendants on notice to make further inquiries to determine whether their conduct was legal. Nor would it have been reasonable for defendants to rely on this placard as an authorization to dump scrap metal off-shore. Large quantities of scrap metal generated by a ship repair facility do not fall within the plain meaning of "non-plastic trash." Moreover, there is substantial evidence that the defendants' claimed reliance was neither actual nor in good faith. Had West Indies Transport truly believed that its ocean dumping was legal, it would not have consistently dumped scrap metal under cover of darkness.

The second example placard submitted by the defendants was manufactured by "Seachoice Products," apparently a private ship chandler. The entrapment by estoppel defense applies only to representations made by government officials, not to asserted reliance on legal advice or

representations from non-governmental actors. Representations made by Seachoice Products or any other private entity as to the legality of ocean dumping cannot remotely establish a valid entrapment by estoppel defense. Even if the placard contained representations by the government, it would not warrant the defense, for the placard contains no statements regarding the legality of dumping scrap metal at sea.

No government official ever told West Indies Transport its dumping operations were legal. Nor does it appear from the record that West Indies Transport ever asked the government for advice on this matter. Defendants were experienced operators in the maritime industry. It was clearly unreasonable for defendants to rely on a placard that appears on all types of vessels, including recreational boats, as legal justification for industrial ocean dumping.

VI. Racketeering and Conspiracy

Defendants assert if we reverse their convictions on the immigration and environmental crimes counts, we must reverse their convictions for conspiracy and racketeering. Because we affirm defendants' convictions for visa fraud and environmental violations, we will affirm these convictions as well.

Defendants also contend their racketeering convictions must be overturned because none of the predicate acts was a local Virgin Islands offense. The Virgin Islands RICO statute, 14 V.I.C. § 604, requires only that at least one predicate act charged as a federal offense also "constitute" a felony under Virgin Islands law. 14 V.I.C.

§ 604(j)(2)(C). But, the one requisite local predicate act need not be charged as a local felony, but merely "constitute" one. Here, defendants were charged with and convicted for conspiracy under federal law. Conspiracy also constitutes a felony under the Virgin Islands Code. *See* 14 V.I.C. § 551. We see no error here.

VII. Sentencing

Defendants raise several sentencing objections.

A.

First, defendants contend that the $500,000 fine imposed by the district court under the Corrupt Organizations Act, 14 V.I.C. § 605, was excessive. We review the district court's determination of the amount of a fine for clear error. *United States v. Seale*, 20 F.3d 1279, 1284 (3d Cir.1994). The defendants concede the fine falls within the range permitted by law. Nor have defendants pointed to any legal or factual error underlying the assessment of a fine in this amount. We see no error here.

B.

Defendants also contend the six level enhancement for ongoing, continuous, or repetitive discharge of a pollutant assessed by the district court under U.S.S.G. § 2Q1.3(b)(1)(A) should be reduced because the raw human sewage defendants dumped into navigable waters was "fully biodegradable." Our review is plenary. *United States v. James*, 78 F.3d 851 (3d Cir.), *cert. denied*, 519 U.S. 844, 117 S.Ct. 128, 136 L.Ed.2d 77 (1996).

Defendants cite no authority for the proposition that untreated human sewage or fully biodegradable pollution warrants different treatment under the guidelines than other pollutants, nor any reasons why we should adopt such a rule. Because untreated human sewage falls within the clear meaning of "pollutant" under § 2Q1.3(b)(1)(A), we will affirm the enhancement.

C.

The district court ordered defendants to pay restitution to offset the costs of cleaning up their environmental damage. Restitution is authorized only for violations of Title 18 and some Title 49 provisions. *See* 18 U.S.C. § 3663. Defendants contend the trial court erred by ordering restitution for title 33 offenses. Our review is plenary. *United States v. Maurello,* 76 F.3d 1304 (3d Cir.1996).

Defendants' argument is meritless. Each Title 33 offense also charged a violation of 18 U.S.C. § 2. Restitution is authorized for violation of 18 U.S.C. § 2.

D.

Defendants also imply, though they do not clearly argue, that the amount of restitution was excessive given the amount of environmental damage caused by their criminal conduct. We review the appropriateness of a particular restitution award for abuse of discretion. *United States v. Maurello,* 76 F.3d 1304 (3d Cir.1996). The district court calculated restitution based on Coast Guard estimates of the costs required to clean defendants' environmental damage. The district court also ordered that if

the ultimate cost of the clean-up is lower than the Coast Guard estimate, any amount over the actual costs shall be returned to the defendants. This sensible approach appears appropriate and does not constitute an abuse of discretion.

VIII.

For these reasons, the judgments of conviction and sentence will be affirmed.

NYGAARD, Circuit Judge, concurring and dissenting.

I agree with most of the government's argument. Regarding the Clean Water Act charges, I cannot. It is true, of course, that "wrecked or discarded equipment" is a listed "pollutant" under 33 U.S.C. § 1362(6). Webster's, however, defines "equipment" as "the set of articles or physical resources serving to equip a person or thing. . . . " *Webster's Ninth New Collegiate Dictionary* 421 (1988). I do not think these parts of the *Witconcrete II* – which in better times were an integral part of its hull – can properly be thought of as part of the ship's equipment. They were not mere appurtenances, like a loading crane or radar antenna dumped over the side. I believe they were a part of the ship itself.

That aside, however, there still was no "point source" within the meaning of the Act. The Clean Water Act prohibits discharging pollutants into the navigable waters of the United States without a permit; however, it regulates discharges only from "point sources." *See* 33 U.S.C. §§ 1311(a), 1362(12). Appellants argue that they

cannot be criminally culpable because as a matter of law the discharges above did not emanate from point sources. Under 33 U.S.C. § 1362(14), "point source" is defined as follows:

> "any discernable, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged."

Appellants rely on *United States v. Plaza Health Laboratories, Inc.*, 3 F.3d 643 (2d Cir.1993). There, the defendant owned a medical testing laboratory. He loaded vials of blood into his car and dumped them into the Hudson River. He was indicted under the Clean Water Act. The Court of Appeals, however, ruled that defendant, as an individual dumping waste directly into a body of water, was not a "point source" within the meaning of the Act and reversed his conviction.

After first observing that "this statute was never designed to address the random, individual polluter," *id.* at 646, the Plaza Health Court looked to the language and structure of the Act and concluded that the listed items in the statute "evoke[d] images of physical structures and instrumentalities that systematically act as a means of conveying pollutants from an industrial source to navigable waterways." *Id.* It then reasoned that an interpretation of the statutory text that brought every act of "discharge involving humans" within the ambit of the term "point source" would make that text redundant, *id.*

at 646-47, and thus contrary to long-established principles of statutory construction.

The Court next turned to the legislative history of the Act and found no congressional intent "to impose criminal liability on an individual for the myriad, random acts of human waste disposal, for example, a passerby who flings a candy wrapper into the Hudson River, or a urinating swimmer." *Id.* at 647. Moreover, it found no such expansive interpretation of the Act in the criminal case law, although it noted that courts dealing with this issue in the context of civil penalties have construed the statute more broadly. *Id.* at 648. Finally, the *Plaza Health* Court found no evidence of any administrative interpretation by the EPA that would bring the defendant's conduct within the statute. *Id.* at 649.

Based on these observations, the Court then concluded "that the term 'point source' as applied to a human being is at best ambiguous." *Id.* Applying the rule of lenity, it held that the prosecution must be dismissed. *Id.*

The government relies, however, on *United States v. M.C.C. of Florida, Inc.*, 772 F.2d 1501 (11th Cir.1985), in which a contractor building a bridge in the Florida Keys departed from the approved plan and brought construction assemblies in by barge. Unfortunately, the tug's screws stirred up sand from the bottom of a shallow body of water and redeposited it on nearby grass beds, damaging them. The *M.C.C.* court held that material already in the water, when redeposited, could constitute a discharge under the Clean Water Act. *Id.* at 1506. Without dwelling on the issue, the court concluded that because "vessel"

was included in the statutory list of possible point sources, the tug's screws were a point source under the facts of that case. *Id.* at 1505-06.

It is evident to me that when Congress used the term "point source," it had in mind something other than the propulsion system of every ship that happens to operate in navigable waters. I would thus conclude that a point source is the conduit, conveyance or vector by which pollutants are discharged, and not the screws of a vessel stirring up old pollutants without discharging anything at all.

I would not follow *M.C.C.* for another reason: there, the government sought only civil penalties. Here, we are reviewing a felony conviction, and must apply different maxims of statutory construction. Remedial statutes are typically construed broadly to effectuate the legislative purpose behind them. Criminal statutes are construed more narrowly to give defendants fair warning of the conduct the legislature intended to penalize. I conclude that *Plaza Health* fits our case particularly well, and would adopt its holding.

I would also conclude that the error here was plain. In *United States v. Olano*, 507 U.S. 725, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993), the Supreme Court clarified the standard that courts of appeals must employ when deciding whether a forfeited error warrants reversal under Fed.R.Crim.P. 52(b). First, of course, there must be an error that has not been knowingly and intentionally waived. *Id.* at 732-33, 113 S.Ct. at 1776-77. Second, the error must be plain; that is, clear or obvious under current law. *Id.* at 734, 113 S.Ct. at 1777. Third, the plain error

must have affected substantial rights, generally by affecting the outcome of the district court proceedings. *Id.* at 734, 113 S.Ct. at 1777-78. Finally, once this threshold has been crossed, the reviewing court must exercise its discretion, correcting the error if it "seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings," *Id.* at 736, 113 S.Ct. at 1779 (quoting *United States v. Atkinson*, 297 U.S. 157, 160, 56 S.Ct. 391, 392, 80 L.Ed. 555 (1936)), as when the error caused the conviction of an "actually innocent defendant." *Id.* at 736, 113 S.Ct. at 1779.

Turning to this case, the Clean Water Act proscribes only "the discharge of any pollutant," 33 U.S.C. § 1311(a), which in turn is defined as "any addition of any pollutant . . . from any point source. . . . " 33 U.S.C. § 1362(12). It is evident that the requirement that the discharge emanate from a point source is an essential element of the crime.

We have held recently that "[t]he omission of an essential element of an offense from the jury instructions usually will be obvious error, and therefore ordinarily satisfies the first and second requirements of *Olano.*" *United States v. Stansfield*, 101 F.3d 909, 920 (3d Cir.1996) (citation omitted); *accord United States v. Zolicoffer*, 869 F.2d 771, 774 (3d Cir.1989) ("the failure to prove one of the essential elements of a crime is the type of fundamental error which may be noticed by an appellate court notwithstanding the defendant's failure to raise it in the district court"). Thus, I conclude that to the extent appellants' Clean Water Act convictions rested on the

erroneous conclusion that the discharges came from point sources, the error was "plain."[1]

I likewise have no difficulty concluding that the error involved appellants' substantial rights and seriously undermined the fairness, integrity and reputation of the judicial proceedings. If the discharges did not emanate from a point source, an issue to which I shall turn shortly, then appellants could not, as a matter of law, have been convicted of Clean Water Act violations, and are "actually innocent" of the offense. Such a conviction would be a classic miscarriage of justice. Accordingly, to the extent there was error, we have the power to correct it and I would exercise our discretion to do so.

I believe that neither the discharge of the *Witconcrete II's* stern nor its protruding rebar qualifies as a point source within the meaning of the Clean Water Act. The severing of the stern was not a discharge from a vessel, as required by 33 U.S.C. § 1362(14). Rather, a part of the vessel itself was discharged. Appellants merely severed a wrecked, useless portion of the *Witconcrete II* to extricate a serviceable forward portion of it. This was a salvage operation, not a discharge of concrete and rebar through the instrumentality of the barge.

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[1] My conclusion is not altered by the fact that *Plaza Health*, a Second Circuit case, was not binding in this circuit at the time of appellants' trial. In *United States v. Retos*, 25 F.3d 1220, 1230 (3d Cir.1996), we held that the defendant was entitled, on plain error review, to the benefit of a Supreme Court decision handed down after his trial but before his appeal became final. Here, the law was clear at the time of trial; although not binding in a formal sense, the holding of *Plaza Health* has not been questioned by any other court facing analogous facts.

Likewise, the severed rebar was not discharged through the "conveyance" of the barge, *see* 33 U.S.C. § 1362(14), it was part of the barge itself. Put another way, I think these two discharges are closer to the intermittent, manual blood dumping of *Plaza Health* than they are to the industrial paradigm of the sewage treatment plant, oil refinery or steel mill that animates most Clean Water Act cases.[2] I would accordingly reverse appellants' convictions at counts one and two.

I also disagree with the government's argument concerning the Rivers and Harbors Act. I rely again on the language of the statute, 33 U.S.C. § 403, under which it is prohibited "to build or commence the building of any wharf, pier . . . or other structures." In sum, these barges were placed in their current locations by the hurricane, not by WIT. At most, WIT wired them to the local utilities and built some walkways to connect them. That may be the "use" of an existing structure, but it is not the "build[ing]" of a new one.

In more detail, appellants had a permit to moor four vessels in Krum Bay as docks. When Hurricane Hugo hit the Virgin Islands in 1989, it ran some of these vessels aground and otherwise shifted their positions from those specified in the permits. After the storm, appellants did not move these vessels back to their original positions, but used them where they sat. By November 1992, the permits had expired. In count three of the superseding

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[2] The government also argues that the stern and rebar became "wrecked and discarded equipment," a listed pollutant under § 1362(6), but that begs the question of whether there was a point source, which I conclude there was not.

indictment, the government charged appellants with misdemeanor violations of the Rivers and Harbors Act, 33 U.S.C. § 403, which proscribes creating piers and wharves without a permit. Appellants did not challenge the sufficiency of the evidence to support their convictions in the district court, so again the plain error standard applies.

Under longstanding precedent, prohibiting "build[ing] or commenc[ing] the building of any wharf, pier . . . or other structures" contained in section 403 contemplates "the purposeful creation of something formulated or designed, construction work in the conventional sense." *United States v. Bigan*, 274 F.2d 729, 732 (3d Cir.1960) (emphasis added). There, we held that a negligently caused earth slide resulting in an obstruction to a river channel was not a violation of section 403. Likewise, we have held that negligently sinking a vessel in a river channel did not violate the Act. *See United States v. Ohio Barge Lines, Inc.*, 607 F.2d 624, 629 (3d Cir.1979); *accord United States v. Wilson*, 235 F.2d 251, 253 (2d Cir.1956) (a sunken barge may be an "obstruction," but is not a "structure" in violation of § 403).

Here, appellants had every right to moor vessels in Krum Bay, but the hurricane shifted them out of position. Appellants, however, never purposely put the vessels in their current positions and hence never built any structure in violation of the Act. Because, as I have discussed *supra*, the government utterly failed to adduce evidence supporting an essential element of the crime, I would deem the error plain and exercise our discretion to correct it under Fed. R.Crim. ¶ 52(b). Accordingly, I would reverse the convictions at count three.

Supreme Court, U.S.
FILED
SEP 21 2001
OFFICE OF THE CLERK

No. 00-1747

In the Supreme Court of the United States

WEST INDIES TRANSPORT CO., INC., ET AL.,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether in an action for a writ of execution under the Federal Debt Collection Procedure Act of 1990, a district court may reconsider the validity of the underlying restitution order.

2. Whether a district court has authority to order restitution under 18 U.S.C. 3663(a) (1994 & Supp. V 1999) based on a conviction under 18 U.S.C. 2.

3. Whether the United States is a victim of the offenses committed by petitioners and therefore eligible to receive restitution under 18 U.S.C. 3663(a) (1994 & Supp. V 1999).

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-2) is unreported. The opinion of the district court (Pet. App. 3-15) is reported at 57 F. Supp. 2d 198. An opinion of the district court addressing preliminary issues (Pet. App. 38-55) is reported at 35 F. Supp. 2d 450. The opinion of the district court denying reconsideration (Pet. App. 16-37) is unreported. An earlier opinion of the court of appeals affirming petitioners' convictions and sentences (Pet. App. 56-96) is reported at 127 F.3d 299.

JURISDICTION

The judgment of the court of appeals was entered on December 19, 2000. On March 9, 2001, Justice Souter extended the time within which to file a petition for a

writ of certiorari to and including May 18, 2001, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner Oelsner was the chief operating officer of petitioners West Indies Transport Co., Inc. and WIT Equipment Co., Inc. Pet. App. 58. Petitioners operated a dry dock, ship repair facility, and barge towing company in Krum Bay, St. Thomas. *Ibid.* Petitioners imported foreign laborers for construction work under the guise of hiring foreign crewmen and then paid them below minimum wages. *Ibid.* Petitioners also housed employees and conducted drydock operations on a pier they constructed without a federally required permit. *Ibid.* In addition, petitioners intentionally discharged several different pollutants into navigable waters. *Id.* at 59. To dispose of waste generated by their operations, petitioners engaged in midnight ocean dumping runs. *Ibid.* Petitioners never obtained a permit for any of their pollution discharges. *Ibid.*

After a jury trial, petitioners were convicted of violating the Clean Water Act, 33 U.S.C. 1311(a), 1319(c)(2)(A); the Rivers and Harbor Appropriation Act, 33 U.S.C. 403, 406; and the Ocean Dumping Act, 33 U.S.C. 1411(a)(1), 1415(b)(1). Pet. App. 4 n.1. Petitioners were also convicted of conspiracy to defraud the United States and misuse of visas. *Ibid.* In connection with the convictions under the Clean Water Act and Ocean Dumping Act, petitioners were also convicted as aiders and abettors under 18 U.S.C. 2. *Ibid.*

Pursuant to 18 U.S.C. 3663(a) (1994 & Supp. V 1999), the district court ordered petitioners to pay restitution to the United States in order to offset the costs of

cleaning up the environmental damage they caused. Section 3663(a) provides, in relevant part, that "[t]he court, when sentencing a defendant convicted of an offense under this title, * * * may order * * * that the defendant make restitution to any victim of such offense." Petitioners' convictions as aiders and abettors under 18 U.S.C. 2 of environmental crimes committed under Title 33 served as the foundation for the restitution orders.

The court ordered petitioner Oelsner to pay $1,440,450 in restitution; it ordered petitioner West Indies to pay $1,440,450 in restitution; and it ordered petitioner WIT to pay $1,530,500. Pet. App. 18, 19 n.3. Each judgment specified that restitution payments made by any one of the petitioners would be applied to reduce the amount of restitution owed by the other petitioners. *Id.* at 18-19, n.2 & n.3. All three judgments contained identical lists of vessels and real estate that were subject to liens. *Id.* at 19. The vessel Wittug was included in the list. *Ibid.*

2. The court of appeals affirmed petitioners' convictions and sentences. Pet. App. 56-96. The court rejected petitioners' contention that the district court erred in ordering restitution for Title 33 offenses. *Id.* at 88. The court of appeals stated that each Title 33 offense also charged a violation of 18 U.S.C. 2, and that restitution is authorized for violation of 18 U.S.C. 2. *Ibid.* This Court denied certiorari. 522 U.S. 1052 (1998) (No. 97- 931).

3. The United States applied for a writ of execution on the vessel Wittug under the Federal Debt Collection Procedures Act of 1990 (FDCPA), 28 U.S.C. 3001 *et seq.* The FDCPA establishes "the exclusive civil procedures for the United States * * * to recover a judgment on a debt." 28 U.S.C. 3001(a)(1). A judgment includes a

judgment issued in a criminal proceeding, and a debt includes "an amount that is owing to the United States on account of" an order of "restitution." 28 U.S.C. 3002(3)(B), 3002(8). The FDCPA permits the enforcement of a judgment by writ of execution. 28 U.S.C. 3203(c). A judgment debtor may move to quash the writ and obtain a hearing on that motion. 28 U.S.C. 3202(d). Except in the case of a default judgment, the FDCPA limits the issues that may be addressed at the hearing to "the probable validity of any claim of exemption by the judgment debtor" and "compliance with any statutory requirement for the issuance of the post-judgment remedy." 28 U.S.C. 3202(d)(1) and (2). When there is a default judgment, a debtor may also challenge "the probable validity of the claim for the debt which is merged in the judgment," and "the existence of good cause for setting aside such judgment." 28 U.S.C. 3202(d)(3).

Petitioners filed a motion to quash the writ of execution and to obtain a hearing on that motion. Pet. App. 19. The district court granted petitioners' request for a hearing on two claims—that the amount of restitution should be reduced to reflect petitioners' remedial efforts, and that petitioners did not own the Wittug. *Id.* at 43-44. The court held that it would not entertain petitioners' challenges to the validity of the underlying judgment awarding restitution. The court explained that, under the FDCA, "a challenge to the validity of a judgment exceeds the scope of a hearing on a writ." *Id.* at 44.

After the hearing, the district court denied petitioners' request to reduce the amount of restitution, and rejected petitioners' argument that they did not own the Wittug. Pet. App. 7-9. The court authorized

the United States to execute judgment by levying on the Wittug. *Id.* at 15.

Petitioners then filed a second motion to quash, arguing, *inter alia*, that their offenses did not have a clear victim and that restitution therefore should be limited to the amount of their fines. Pet. App. 23. The district court refused to consider that contention on the grounds that (1) the court of appeals' mandate affirming the restitution award foreclosed consideration of that issue, (2) petitioners waived the issue by failing to present it on direct appeal, and (3) petitioners waived the issue by failing to raise it in their first motion to quash. *Id.* at 28-29.

4. In an unreported opinion, the court of appeals affirmed. Pet. App. 1-2. The court of appeals stated that "the district court acted in full conformity with our prior opinion." *Id.* at 2.

ARGUMENT

Petitioners contend (Pet. 14-16) that the lower courts erred in failing to reconsider the validity of the underlying judgment awarding restitution. Petitioners further contend (Pet. 17-20) that the underlying restitution award is illegal because an offense under 18 U.S.C. 2 may not serve as the basis for an award of restitution and the United States is not eligible to receive restitution. The FDCPA precludes consideration of petitioners' challenges to the restitution award, and petitioners failed to raise their challenges to the award in a timely manner in any event. Petitioners' contentions therefore do not warrant review.

1. When the United States seeks a writ of execution under the FDCPA, a judgment debtor may seek to quash the writ and may obtain a hearing on that motion. 28 U.S.C. 3202(d). Unless there has been a default

judgment, however, the sole issues that may be addressed at the hearing are "the probable validity of any claim of exemption by the judgment debtor" and "compliance with any statutory requirement for the issuance of the post judgment remedy." 28 U.S.C. 3202(d)(1) and (2). Where, as here, the judgment is fully litigated, a debtor may not assert "the probable validity of the claim for the debt which is merged in the judgment, or "the existence of good cause for setting aside such judgment." 28 U.S.C. 3202(d)(3).

Petitioners' contentions (Pet. 17-20) that a conviction under 18 U.S.C. 2 does not authorize an award of restitution and that the United States is not a victim of petitioners' crime both directly challenge the validity of the underlying judgment awarding restitution. Neither contention raises a "claim of exemption" or lack of "compliance" with a "statutory requirement for issuance" of a writ. Thus, under the express terms of the FDCPA, the district court had no authority to consider petitioners' contentions.

Petitioners argue (Pet. 15) that traditional law of the case principles permit reconsideration of an earlier decided issue when the initial decision is clearly erroneous and the failure to reconsider would work a manifest injustice. The FDCPA, however, does not incorporate traditional law of the case principles. Absent a default judgment, it absolutely bars reconsideration of the underlying judgment. 28 U.S.C. 3202(d)(3). Nor is there any inconsistency between the operation of the FDCPA and traditional law of the case principles. Law of the case rules govern reconsideration of an issue during the course of a "single continuing lawsuit." *DeVilla* v. *Schriver*, 245 F.3d 192, 194 (2d Cir. 2001). The filing of a writ of execution under the FDCPA involves the filing of new "action or proceeding" to collect a debt;

it is not a continuation of the criminal prosecution that resulted in the judgment on which the writ is based. 28 U.S.C. 3202(b). Thus, the FDCPA forecloses consideration of petitioners' challenges to the restitution order, and law of the case principles do not suggest otherwise.

2. Review is also unwarranted in this case because petitioners failed to properly present their challenges to the restitution order below. In the criminal proceedings against them, petitioners opposed restitution on the ground that a restitution order may not be based on a violation of 18 U.S.C. 2. The court of appeals rejected that contention, holding that restitution is authorized for violations of 18 U.S.C. 2. Pet. App. 88. In opposing the writ of execution, however, petitioners did not urge either the district court or the court of appeals to reconsider that ruling. Nor did either court reconsider that issue sua sponte. Because petitioners did not ask for reconsideration of the ruling that 18 U.S.C. 2 may serve as the basis for a restitution order below, and the courts did not consider that issue on their own, that question is not properly presented here. *Zobrest* v. *Catalina Foothills Sch. Dist.*, 509 U.S. 1, 8 (1993).

Similarly, petitioners did not assert that the United States is not eligible to receive restitution until they filed their *second* motion opposing the writ. Pet. App. 29. At that juncture, the district court refused to consider the issue, explaining that petitioners had "waived" the issue by failing to raise it in their first motion to quash. *Id.* at 29 n.9. The court of appeals similarly did not consider that issue. *Id.* at 1-2. Because petitioner failed to present the question whether the United States is eligible to receive restitution in a

timely manner, and the courts below did not consider it, that issue is also not properly presented here.

3. On the merits, petitioners contend (Pet. 17-20) that the district court lacked authority to award restitution because petitioners committed offenses under Title 33 and not under Title 18. In its decision affirming petitioners' convictions, the court of appeals rejected that contention. It stated that "[e]ach Tile 33 offense also charged a violation of 18 U.S.C. § 2," and that "[r]estitution is authorized for violation of 18 U.S.C. § 2." Pet. App. 88.

Petitioners contend (Pet. 19) the court of appeals' holding that a conviction under 18 U.S.C. 2 may serve as the basis for a restitution order conflicts with the decisions in *United States* v. *Minneman*, 143 F.3d 274, 283-284 (7th Cir. 1998), cert. denied, 526 U.S. 1006 (1999), and *United States* v. *Helmsley*, 941 F.2d 71, 101 (2d Cir. 1991), cert. denied, 502 U.S. 1091 (1992). There is, however, no conflict. Those cases hold that a conviction for a conspiracy in violation of 18 U.S.C. 371 may serve as the basis for a restitution order, even when the underlying substantive offense is not a Title 18 offense. *Ibid.* Neither case addresses whether a conviction for aiding and abetting in violation of 18 U.S.C. 2 may serve as the basis for a restitution order when the underlying offense is not a Title 18 offense.

In *United States* v. *Snider*, 957 F.2d 703, 706 (1992), a case not cited by petitioners, the Ninth Circuit held that 18 U.S.C. 2 may not serve as the foundation for a restitution order. The court summarily concluded that "Section 2 does not establish 'an offense' of which a defendant may be convicted; it merely determines which offenders may be punished as principals." *Ibid.* Because of the procedural considerations discussed above, this case does not provide an appropriate vehicle

for resolving the conflict between the Ninth and the Third Circuits on the question whether 18 U.S.C. 2 may serve as the basis for an award of restitution. In particular, because the FDCPA precludes consideration of that issue in the present context, and petitioners waived the claim by not raising it below in any event, review of that issue is not warranted here.

Finally, petitioners err in contending (Pet. 19) that the United States is not a "victim" of their environmental crimes. The Victim Witness and Protection Act of 1982 (VMPA) defines a "victim" as "any person directly and proximately harmed" by the defendant's criminal conduct. 18 U.S.C. 3663(a)(2) (1994 & Supp. V 1999). The Act does not create any exception for governmental victims. The courts of appeals have therefore uniformly held that governmental entities can be victims under the VWPA. *United States* v. *Martin*, 128 F.3d 1188, 1191 (7th Cir. 1997) (citing decisions from seven circuits). As one of those courts has explained, the VWPA "makes no distinction between an out-of-pocket government and a victimized private person." *United States* v. *Dudley*, 739 F.2d 175, 177 (4th Cir. 1984).

The United States also satisfies the definition of a victim here. The Coast Guard was required to bear the costs of cleaning up the environmental damage caused by petitioners' crimes. The Coast Guard was therefore "directly and proximately harmed" by [petitioners'] criminal conduct. 18 U.S.C. 3663(a)(2) (1994 & Supp. V 1999).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 2001

Supreme Court, U.S.
FILED
OCT 4 2001
OFFICE OF THE CLERK

No. 00-1747

In The

Supreme Court of the United States

WEST INDIES TRANSPORT CO., INC.,
WIT EQUIPMENT CO., INC., and
W. JAMES OELSNER,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

PETITIONERS' REPLY TO BRIEF IN OPPOSITION

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12 pp

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ARGUMENT IN REPLY

WEST INDIES TRANSPORT CO., INC., WIT EQUIPMENT CO., INC., and W. JAMES OELSNER have petitioned this Court jointly for a writ of certiorari to review the judgment and memorandum of the Third Circuit, enforcing a lien to execute part of a judgment of sentence in a federal criminal case in which they were co-defendants. Pet. App. 1-2. The district court, at sentencing, declared the defendants (petitioners here) jointly and severally liable for up to $1,440,450 as the estimated costs of removing wrecks from Krum Bay, St. Thomas, U.S. Virgin Islands, characterizing this as an order of restitution.[1]

The brief in opposition ("Br.Opp.") proposes two reasons why certiorari should not be granted. Neither touches the merits. First, the respondent relies on 28 U.S.C. § 3202(d), which restricts the issues that the district court may consider at a hearing on a motion to quash a writ of execution to collect a debt due the United States.[2] Br.Opp. 5-7. Under that statute, the government

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[1] The district court later clarified that this amount was to be paid to the United States, to the extent the petitioners did not satisfactorily undertake the cleanup effort themselves, and subject to a reduction if the actual cost of cleanup proved to be less. Pet.App. 2, 7, 47-48, 55. In addition, petitioner Oelsner was ordered to pay $595,500 in fines (plus $750 in special assessments), while the two corporate petitioners were to pay another $3,520,500 and $1,520,500, respectively, on top of the restitution. Pet.App. 5 n.3.

[2] This part of the Federal Debt Collection Procedures Act of 1990 provides:

> **(d) Hearing.** – By requesting, within 20 days after receiving the notice described in section 3202(b),

contends, even the blatant invalidity of the restitution order cannot be considered; it must simply be enforced and executed. Second, the respondent contends that the arguments made in the petition were not advanced in or considered by the courts below. Br.Opp. 7-8.

On the underlying merits question, the government concedes a square conflict in the circuits, Br.Opp. 8 (citing *United States v. Snider*, 957 F.2d 703, 706 (9th Cir. 1992)

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the court to hold a hearing, the judgment debtor may move to quash the order granting such remedy. The court that issued such order shall hold a hearing on such motion as soon as practicable, or, if so requested by the judgment debtor, within 5 days after receiving the request or as soon thereafter as possible. The issues at such hearing shall be limited –

(1) to the probable validity of any claim of exemption by the judgment debtor;

(2) to compliance with any statutory requirement for the issuance of the postjudgment remedy granted; and

(3) if the judgment is by default and only to the extent that the Constitution or another law of the United States provides a right to a hearing on the issue, to –

(A) the probable validity of the claim for the debt which is merged in the judgment; and

(B) the existence of good cause for setting aside such judgment.

This subparagraph shall not be construed to afford the judgment debtor the right to more than one such hearing except to the extent that the Constitution or another law of the United States provides a right to more than one such hearing.

28 U.S.C. § 3202.

(per curiam; on rehearing)), but merely repeats its procedural reason for suggesting that "this case does not provide an appropriate vehicle for resolving the conflict. . . . " Br.Opp. 8-9. Finally, respondent contends that it is well-settled that the government can be a victim eligible to receive restitution under 18 U.S.C. § 3663 – a point not disputed in the petition – and then asserts, without explanation, that the Coast Guard was such a victim here. None of these objections justifies denial of the petition.

1. The respondent waived its reliance on 28 U.S.C. § 3202(d) below, and in any event that statute is inapplicable to proceedings in this Court.

The respondent relies first upon the objection that the validity of the restitution judgment cannot be raised as a defense in proceedings to execute on that judgment. This is the position initially taken by the district court, Pet.App. 44, and the hearing held below was accordingly limited in accordance with § 3202(d) of the Federal Debt Collection Procedures Act. In response to the defendant-petitioners' motion for relief from judgment (which the district court mistakenly referred to as a "second motion . . . to quash or stay the government's writ of execution," Pet.App. 21), however, the district court made no reference to this statute, relying instead on the mandate rule and the law of the case. Pet.App. 28. This was appropriate, as the statute expressly limits only the issues to be considered "at such hearing," *see* note 2 *ante*, and not the power of the district court to reconsider its own judgment more generally.

More important, the government made no reference whatever to 28 U.S.C. § 3202(d) (or any other part of the Debt Collection Act) in the court below (*see* Appellee's Br., 3d Cir. No. 00-3449, filed Sept. 28, 2000; *id.* at ii (table of authorities)). To the contrary, after first arguing that the motion for relief from judgment was an improper attempt to create appellate jurisdiction over the (unappealed) denial of the original motion to quash (a position abandoned by the Solicitor General in opposition to the petition), Appellee's Br. at 6-10,[3] the government proceeded to argue *only* that the relief sought by petitioners was barred by the "law of the case." *Id.* 10-12. In doing so, the government conceded that an exception would apply if the prior judgment were "clearly erroneous and would work a manifest injustice." *Id.* 11. This is just as petitioners contend. Pet. 15.[4]

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[3] The government never argued that the district court had abused its discretion by entertaining the Rule 60(b) motion. Perhaps for this reason, the court below did not even allude to the government-appellee's "jurisdictional" argument; apparently for the same reason, as already noted, the respondent does not advance that argument in this Court in opposition to granting the petition.

[4] The respondent's contention that a proceeding to enforce a criminal judgment is a new and separate (civil) "action or proceeding" under 28 U.S.C. § 3202(b) to which the law of the case doctrine does not apply, Br.Opp. 6-7, is also newly conceived in this Court. The government's initial pleading in the district court was filed under the criminal docket number, and the district court proceeded accordingly (opening a civil docket only when a third party initiated a separate challenge to the writ); the government as appellee made no such argument in the court below, and the court of appeals likewise viewed the proceedings as a continuation of the criminal case.

Not having advanced the statutory defense in the court below, the government has waived that position as respondent in this Court. See *Steagald v. United States*, 451 U.S. 204, 209 (1981); *Hankerson v. North Carolina*, 432 U.S. 233, 240 n.6 (1977); see also *Zobrest v. Catalina Foothills School District*, 509 U.S. 1, 7-8 (1993)[5]; *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 38-39 (1989). The court below thus likewise affirmed the district court solely on the basis of the law of the case, and without reference to any statutory bar. Pet.App. 2. In fact, apparently in the alternative, the court below addressed one of petitioners' objections to the restitution order on its merits. *Id.*

Accordingly, the respondent's principal reason for denying the writ fails. Not only was the government's present position abandoned in the court below, when it relied solely on the law of the case doctrine which it now claims is inapplicable, but it deprived the petitioners and the court below of any opportunity to debate the breadth of the statutory bar. In any event, nothing in § 3202(d) applies to the scope of this Court's authority to consider federal judgments: "A petition for writ of certiorari can expose the entire case to review." *Christianson v. Colt Industries Operating Corp.*, 486 U.S. 800, 817 (1988).[6]

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[5] Ironically, respondent cites *Zobrest*, a case about the limits on what a respondent will be heard to argue in this Court in defense of the judment below, as if it were authority on the scope of what questions a petitioner may properly present. *See* Br.Opp. 7.

[6] For a closely related reason, it is unimportant that petitioners did not vainly press the district court to disregard the Third Circuit's prior decision in this case, nor even ask the court below to reverse its prior, published precedent. *Compare*

For these reasons, the cited provision of the Federal Debt Collection Procedures Act should not dissuade this Court from consideration of the instant petition.

2. The respondent offers not a word in defense of the Third Circuit's blatantly erroneous construction and application of the restitution act.

Petitioners argue that the judgment of restitution imposed on them at sentencing and enforced in the proceedings below is facially invalid under 18 U.S.C. § 3663(a), the restitution provision of the Victim Witness Protection Act ("VWPA"). Their point is simple and clear: liability as one sort of "principal" or another under 18 U.S.C. § 2 for an offense committed under another title does not render that offense one under title 18. As the Ninth Circuit succinctly put it, "The mention of section 2 does not bring the restitution order with the ambit of the VWPA. Section 2 does not establish 'an offense' of which a defendant may be convicted; it merely determines which offenders may be punished as principals." *United States v. Snider*, 957 F.2d 703, 706 (9th Cir. 1992) (per curiam; on rehearing).[7] The government does not offer a

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Br. Opp. 7-8. This Court is the appropriate venue to seek resolution of a split in the circuits and to overturn the decision of the court below rendered on direct appeal, by which a different panel of the same circuit was necessarily bound.

[7] Petitioners agree that *Snider* more clearly demonstrates the existence of a circuit split than the cases they cited, *United States v. Minneman*, 143 F.3d 274, 283-84 (7th Cir. 1998), and *United States v. Helmsley*, 941 F.2d 71, 101 (2d Cir. 1991). *See* Pet. 19. (We appreciate the Solicitor General's characteristic professionalism in this regard.) Our point was only that the

single word in defense of the contrary proposition, even though the petitioners were ordered by the courts below to pay the United States over $1.4 million on that indefensible view of the statute. The respondent concedes a square conflict of published authority between the circuits on this point. Br.Opp. 8. It follows that the requested writ of certiorari should be granted, not denied.

Likewise, on the merits of the other question presented as to the scope of permissible restitution – whether the United States was improperly designated as a "victim" of the petitioners' water pollution offenses – the respondent's position is entirely conclusory. Petitioners have not argued that the government can never be a "victim" for restitution purposes, respondent's straw man argument to the contrary (Br.Opp. 9) notwithstanding. If a crime had been committed against the government's proprietary interests, such as a theft or destruction of government property, then restitution could properly have been made part of the judgment of sentence. But that is not this case. The Coast Guard was not "directly and proximately harmed" by any pollution of Krum Bay. 18 U.S.C. § 3663(a)(2).

Rather, as petitioners have argued, "A governmental agency charged by law with remediating a public harm is not 'victimized' by private, illegal conduct which causes that harm. The agency's expenditures in fulfillment of its public duty are not 'losses' of a crime victim." Pet. 19-20. The circumstances of this case are much more like those

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restriction on § 3663(a) could have been evaded in the same way, by reference to 18 U.S.C. § 2, in those cases, had the Seventh or Second Circuit thought it permissible, but it was not.

of the cases where the circuits have unanimously reversed attempts to award the government "restitution" for its law enforcement expenses, such as the "buy money" used in controlled substances "sting operations." This proposition is now so well recognized that the government has conceded ineffective assistance of counsel, when raised on direct appeal, for stipulating that a defendant should be ordered to pay such "restitution." See *United States v. Bettie*, 2000 WL 1853318 (4th Cir., filed Dec. 19, 2000) (unpub.), noted at 238 F.3d 415 (citing five other circuits as establishing invalidity of such restitution). Respondent does not attempt to answer or refute this argument at all, apparently because it cannot.

Accordingly, to the extent that the respondent claims that this Court should deny certiorari simply because petitioners "err" in their arguments on the merits, Br.Opp. 9, it is the respondent's position that falls short. The petition for certiorari should be granted.

CONCLUSION

For the foregoing reasons, and for the reasons discussed more fully in their petition, WEST INDIES TRANSPORT CO., INC., WIT EQUIPMENT CO., INC., and W. JAMES OELSNER pray that this Court grant their petition for a writ of certiorari to review the judgment and memorandum of the United States Court of Appeals for the Third Circuit upholding the district court's enforcement of the lien for restitution.

Respectfully submitted,

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October 3, 2001